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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 462

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PACIFIC NORTHWEST POWER COMPANY; IDAHO FISH AND GAME COMMISSION; IDAHO WILDLIFE FEDERATION; IDAHO PUBLIC UTILITIES COMMISSION; JONEL C. HILL, PUBLIC UTILITY COMMISSIONER OF OREGON, THE STATE WATER RESOURCES BOARD, THE OREGON STATE GAME COMMISSION, AND THE FISH COMMISSION OF OREGON; WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., OREGON WILDLIFE FEDERATION, FISHERMEN'S CO-OPERATIVE ASSOCIATION, INC., NORTHWEST FISHERIES ASSOCIATION, ALASKA FISHERMEN'S UNION, PACIFIC FISH CONSERVATION LEAGUE, MAKAH INDIAN TRIBE,
Intervenors.

BRIEF OF PETITIONER

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INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Illustrative Maps	Opp. p. 3
Statement of the Case	6
Summary of the Argument	17
Argument	23
Introduction	23
I. The only permit ever issued to the Company excluded the High Mountain Sheep site from its boundaries, purposely and explicitly	23
II. The Act denies authority to the Commission to destroy the statutory preference of public agencies by retroactively expanding a permit's privileges beyond its disclosed boundaries, as it did here	27
A. The statute grants a permittee nothing outside the permit's stated boundaries	27
B. To protect the preference rights of public agencies, the statute restricts the effect of a permit to the boundaries proposed in the notice the Commission must give them	28
C. If the 1954 notice given public agencies was intended to extinguish their preference rights on the High Mountain Sheep site, it was a "false and misleading notice," for it excluded that site. If the notice was not then so intended, the Commission cannot retroactively expand it	31

Page

D. The Commission's rationalization that one preliminary permit has two geographical "scopes" has no support in the statute or regulations 32

E. The decision's rationalization of the need for "flexibility" is answered by the Commission's regulations, violated in this case, which require amendment of a permit to add new "sites or areas" 35

III. The Act's legislative history forbids the permittee's options on the public domain which the Commission reads into the statute 37

A. The legislative history shows a progressive strengthening of the Act's provisions granting preference to public development 38

B. The legislative history shows increasing restrictions on the effect of a permit on the public-agency preference 39

C. The Federal Power Act's public preference mandate states a policy reiterated in federal power legislation with which it must be construed pari materia 41

IV. The Commission's conversion of a limited grant into a floating easement is at war with this Court's decisions strictly construing grants of privileges in public lands and navigable streams 42

V. The decision's "rubber boundary" conflicts with the conservation policy of the mosaic of natural resource laws of which the Federal Power Act is an integral part, to be construed pari materia 45

VI. The decision forebodes destructive consequences to the development of the Nation's remaining hydroelectric resources 46

VII. The Hearst rule is not applicable to the Commission's decision 49

Page

A. The Hearst rule does not insulate from judicial review an agency's exercise of powers which Congress withheld 50

B. The Commission cannot frustrate the mandate of Congress by substituting its own coinage for the explicit words of the statute 52

VIII. The Company's permit was dead when it applied for this license 53

A. The sequence of events 54

B. The Commission's decision in 1958 denying a license for the project encompassed by the permit precluded the use of that permit a second time, to claim a priority on the High Mountain Sheep site 59

C. In any event, the maximum statutory period of the permit expired eighteen months before the Company submitted a license application on the High Mountain Sheep site conforming to the statute 63

Conclusion 65

Appendixes:

A. Relevant sections of the Federal Power Act 1a

B. Relevant regulations of the Federal Power Commission 7a

C. Legislative History of Sections 4(f), 5 and 7 of the Federal Power Act 19a

D. Notice of Company's application for preliminary permit 35a

E. Notice of Company's High Mountain Sheep license application 36a

CITATIONS

Court Cases: Page

American Ship Building Co. v. *NLRB*, 380 U.S. 300 (1965) 53
Atlantic Ref. Co. v. *Public Service Comm. of N. Y.*, 360 U.S. 378 (1959) 49
Caldwell v. *United States*, 250 U.S. 14 (1919) 44
The Charles River Bridge v. *The Warren Bridge, et al.* 36 U.S. (11 Pet.) 420 (1837) 44, 45
F.P.C. v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954) 49
Federal Power Comm. v. *Pacific Power & L. Co.*, 307 U.S. 156 (1938) 49
Federal Power Commission v. *Union Electric Co.* 381 U.S. 90 (1965) 16
Federal Trade Comm. v. *Bunte Bros.*, 312 U.S. 349 (1941) 36, 50
First Iowa Hydro Electric Cooperative v. *F.P.C.*, 328 U.S. 152 (1946) 49
Helvering v. *Reynolds Tobacco Co.*, 306 U.S. 110 (1939) 52
Interstate Commerce Comm. v. *J-T Transport Co.*, 368 U.S. 81 (1961) 15, 16
Louisville Bridge Co. v. *United States*, 242 U.S. 409 (1917) 43, 44
N.L.R.B. v. *Brown*, 380 U.S. 278 (1965) 53
National Labor Relations Board v. *Hearst Publications*, 322 U.S. 111 (1944) 15, 21, 49, 50, 51, 52
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 (1954) 49
Scenic Hudson Preservation Conf. v. *F.P.C.*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied* 16 L.ed 2d 540 (1966) 48
Seaton v. *Texas Co.*, 256 F. 2d 718 (D.C. Cir. 1958) 51
Service v. *Dulles*, 354 U.S. 363 (1957) 52
Social Security Board v. *Nierotko*, 327 U.S. 358 (1946) 51
Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) 62, 63
Texas Gas Transmission Co. v. *Shell Oil Co.*, 363 U.S. 263 (1960) 49
United States v. *Grand River Dam Authority*, 363 U.S. 229 (1960) 44

Page

U. S. v. *Shaughnessy*, 347 U.S. 260 (1954) 52
United States v. *Union Pacific R. Co.*, 353 U.S. 112 (1957) 44
Washington Public Power Supply System v. *Federal Power Commission*, 358 F. 2d 840 (1966) 1, 6, 15

Federal Power Commission Decisions:

Pacific Northwest Power Company, Washington Public Power Supply System, F.P.C. Opinion 418 of February 5, 1964, 31 F.P.C. 247 (1964) 1, 13, 14, 15, 16, 18, 24, 25, 26, 32, 34, 35, 36, 37, 38, 50, 57, 60
Pacific Northwest Power Company, Washington Public Power Supply System, F.P.C. Opinion 418-A of April 30, 1964, on rehearing, 31 F.P.C. 1051 (1964) 2, 13

Statutes:

Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. § 476 46
Act of February 15, 1901, 31 Stat. 790, as amended, 43 U.S.C. § 959 ..... 19a
Act of April 16, 1906, 34 Stat. 117, 43 U.S.C. § 522 .. 41
Act of March 4, 1927, 44 Stat. 1456 61
Act of March 1, 1929, 45 Stat. 1446 61
Act of August 26, 1935, 49 Stat. 838, as amended, 16 U.S.C. § 791a-825r 19a
Act of June 25, 1948, 62 Stat. 928, 28 U.S.C. § 1254(1) 2
Act of July 31, 1950, 64 Stat. 382, 48 U.S.C. § 312a .. 41
Act of August 27, 1964, PL 88-491, 78 Stat. 607 43
Act of October 27, 1965, 79 Stat. 1073, 42 U.S.C. § 1962d-4(a) 48
Atomic Energy Act of 1954, 68 Stat. 929, 42 U.S.C. § 2064 41
Bonneville Project Act, 50 Stat. 733, 16 U.S.C. § 832c 41
Boulder Canyon Project Act, 45 Stat. 1060, 43 U.S.C. § 617d(c) 41, 61
Federal Power Act, 49 Stat. 683, as amended, 16 U.S.C.§§ 791 *et seq.* (1964)
Sec. 3(7) 3, 1a
Sec. 3(11) 2, 52

	Page
Sec. 4(e)	2, 3, 11, 29, 64, 1a, 2a, 30a, 31a
Sec. 4(f)	2, 3, 4, 6, 9, 16, 17, 19, 21, 24, 27, 28, 29, 31, 32, 33, 35, 38, 43, 50, 3a, 19a, 24a, 28a, 29a, 30a
Sec. 5	2, 4, 5, 6, 16, 27, 30, 38, 40, 43, 47, 54, 55, 58, 60, 61, 63, 64, 3a, 19a, 24a, 26a, 29a, 33a
Sec. 7(a)	2, 3, 4, 5, 6, 16, 17, 29, 33, 38, 39, 41, 4a, 19a, 24a, 26a, 27a, 31a
Sec. 7(b)	2, 4a
Sec. 9(a)	56, 4a
Sec. 9(b)	5a
Sec. 9(c)	5a
Sec. 10(a)	2, 13, 54, 5a
Sec. 313(b)	2, 11, 49, 62, 63, 6a
Federal Water Pollution Control Act, as amended, 79 Stat. 908, 33 U.S.C. § 466	48
Federal Water Project Recreation Act, 79 Stat. 213, 16 U.S.C. §§ 460, *et seq.*	48
Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 16 U.S.C. § 662(a)	48
Flood Control Act of 1944, 58 Stat. 890, 16 U.S.C. § 825s	41, 42
Flood Control Act of 1958, 72 Stat. 319, 33 U.S.C. § 701b-08a	41
Fort Peck Project Act, 52 Stat. 405, 16 U.S.C. § 833c	41
General Dam Act, 34 Stat. 386, as amended by 36 Stat. 593	19a
Hanford Atomic Energy Project Act, P.L. 87-701, Sec. 112, 76 Stat. 599 (1962)	65
Mineral Leasing Act, 41 Stat. 438, as amended, 30 U.S.C. 201	45
Niagara Power Project Act, 71 Stat. 401, 16 U.S.C. § 836(b)(1)	41
Reclamation Project Act of 1939, 53 Stat. 1193, 43 U.S.C. § 485h	41
River and Harbor Act of 1899, 30 Stat. 1151, 33 U.S.C. § 403	46
Rural Electrification Act, 49 Stat. 1365, 7 U.S.C. § 904	41
Sale of Power on Salt River Project, 42 Stat. 847, 43 U.S.C. § 598	41

Page

Small Reclamation Project Act of 1956, 70 Stat. 1044, 43 U.S.C. §§ 422a-*l* 41
Taylor Grazing Act, ch. 865, 48 Stat. 1270, as amended 43 U.S.C. § 315b 46
Tennessee Valley Authority Act, 1933, 48 Stat. 64, 16 U.S.C. §§ 831i, j 41
Water Conservation and Utilization Act, Act of August 11, 1939, as amended by 54 Stat. 1124, 16 U.S.C. § 590z-7 41
Water Resources Planning Act, 79 Stat. 249, 42 U.S.C. §1962b-3(3) 48
Water Resources Research Act of 1964, 78 Stat. 329, 42 U.S.C. § 1961b 48
Water Supply Act of 1958, 72 Stat. 297, as amended, 43 U.S.C. § 390b(a) 48

Regulations of the Federal Power Commission:

§ 4.30 .....28, 53, 7a
§ 4.31 ..... 8a
§ 4.32 ..... 9a
§ 4.40 ..... 9a
§ 4.41 .....56, 10a
§ 4.80 ..... 15a
§ 4.81 .....9, 24, 28, 30, 33, 35, 15a
§ 4.82 .....28, 30, 33, [illegible], 16a
§ 4.83 .....30, 35, 18a
§ 4.84 .....10, 25, 27, 30, 34, 36, 52, 18a
§ 5.1 ..... 18a

Hearings, Reports, Documents:

Annual Reports of the Federal Power Commission
Volume 1 (1921) 60
Volume 2 (1922) 61
Volume 3 (1923) 60, 61
Volume 13 (1933) 61, 62
Volume 14 (1934) 62
Federal Power Commission, Hydroelectric Power Resources of the United States, Developed and Undeveloped, January 1, 1964 16
Federal Power Commission, 1 National Power Survey (1964) 16

Page

Hearings, House Comm. on Water Power, 65th Cong., 2d Sess. (1919) 38, 23a, 26a, 27a, 29a, 30a
Hearings, Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. (1935) 34a
H. Doc. 531, 81st Cong., 2d Sess. (1948) 9
H. Rep. No. 842, 63rd Cong., 2d Sess. (1914) 24a, 25a, 29a
H. Rep. No. 16, 64th Cong., 1st Sess. (1916) 25a
H. Rep. No. 715, 65th Cong., 2d Sess. (1918) 20a, 22a, 23a, 26a, 27a, 29a, 30a
H. Rep. No. 1147, 65th Cong., 3rd Sess. (1919) 27a
H. Rep. No. 910, 66th Cong., 2d Sess. (1920) 33a
H. Rep. No. 1318, 74th Cong., 1st Sess. (1935) ..40, 34a
Inter-Agency Committee on Water Resources, Policies and Procedures for Distribution and Coordination of Reports by Agencies Represented on the Inter-Agency Committee on Water Resources (rev. ed. 1958) 48
Opinions of the Attorney General, Volume 41 (1955) 42
S. Doc. 51, 84th Cong., 1st Sess. (1954) 8, 10, 24
S. Doc. 97, 87th Cong., 2nd Sess. (1962) 48
S. Rep. No. 898, 63rd Cong., 3rd Sess. (1915) ..25a, 29a
S. Rep. No. 66, 64th Cong., 1st Sess. (1916) ..25a, 29a
S. Rep. No. 180, 66th Cong., 1st Sess. (1919) 22a, 23a, 33a
S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 40, 34a

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Intervenors.

BRIEF OF PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of the District of Columbia Circuit is reported in 358 F. 2d 840, and printed at IV R. 372.

The decision of the Federal Power Commission, February 5, 1964, is printed at II R. 609. The dissent-

ing opinion of Chairman Swidler, joined by Vice Chairman Black, appears at II R. 686. The decision of the Commission April 30, 1964, denying petition for rehearing and stay, is printed at II R. 780, and the dissent thereto of Vice Chairman Black, joined by Chairman Swidler, appears at II R. 802.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The judgment of the Court of Appeals was entered March 24, 1966 (IV R. 389). Time to file petition for certiorari was extended by this Court to August 21, 1966 (IV R. 390). Petition for writ of certiorari was filed August 19, 1966. Certiorari was granted November 7, 1966 (IV R. 392).

STATUTE INVOLVED

The statutory provisions primarily involved are Sections 3(11), 4(e), 4(f), 5, 7(a), 7(b), 10(a), and 313(b) of the Federal Water Power Act of 1920, 41 Stat. 1063, as amended, 16 U.S.C. §§ 797(e)-(f), 798, 800(a) and (b), 803(a), 825*l*(b) (1964 ed.). These are printed, with other relevant sections of the Federal Power Act, in Appendix A to this brief. Relevant regulations of the Commission are printed in Appendix B.

MAP B

MAPS ILLUSTRATING HIGH MOUNT

MAP A – Area map

MAP B – Enlargement of outlined

HIGH MOUNTAIN SHEEP DAMSITE

LOW MOUNTAIN SHEEP DAMSITE

CHINA GARDENS DAMSITE

NEZ PERCE DAMSITE

LOWER CANYON DAMSITE

HIGH MOUNTAIN SHEEP DAMSITE

LOW MOUNTAIN SHEEP DAMSITE

PLEASANT VALLEY DAMSITE

FREEDOM DAMSITE

HELLS CANYON DAM

SALMON RIVER

SNAKE RIVER

IDAHO

OREGON

SNAKE RIVER

IMNAHA RIVER

OREG

MAP A

SCALE IN MILES

2 0 2 4 6

E.W. BECK and ASSOCIATES

LEGEND

1. AREA ABOVE PLEASANT VALLEY DAMSITE COMMON TO ALL PROJECT

2. RESERVOIR AREA, ADDITIONAL TO (1), DESCRIBED IN NOTICE O COMPANY'S PERMIT APPLICATION (II R. 810-11).

3. (SHOWN ON MAP A) AREA, ADDITIONAL TO (1) AND (2), PRE-EM PERMIT IF "THE STATUTORY INTENT * * * IS TO GIVE A PERM RIGHT TO DEVELOP THAT REACH OF A RIVER TO WHICH THE PERM (II R. 643; Cf. "COMMON REACH" AT II R. 621 n. 10)

4. (SHOWN ON MAP B) AREA, ADDITIONAL TO (1) AND (2), DESCR IN NOTICE OF COMPANY'S HIGH MOUNTAIN SHEEP LICENSE APPL (I R. 238-39).

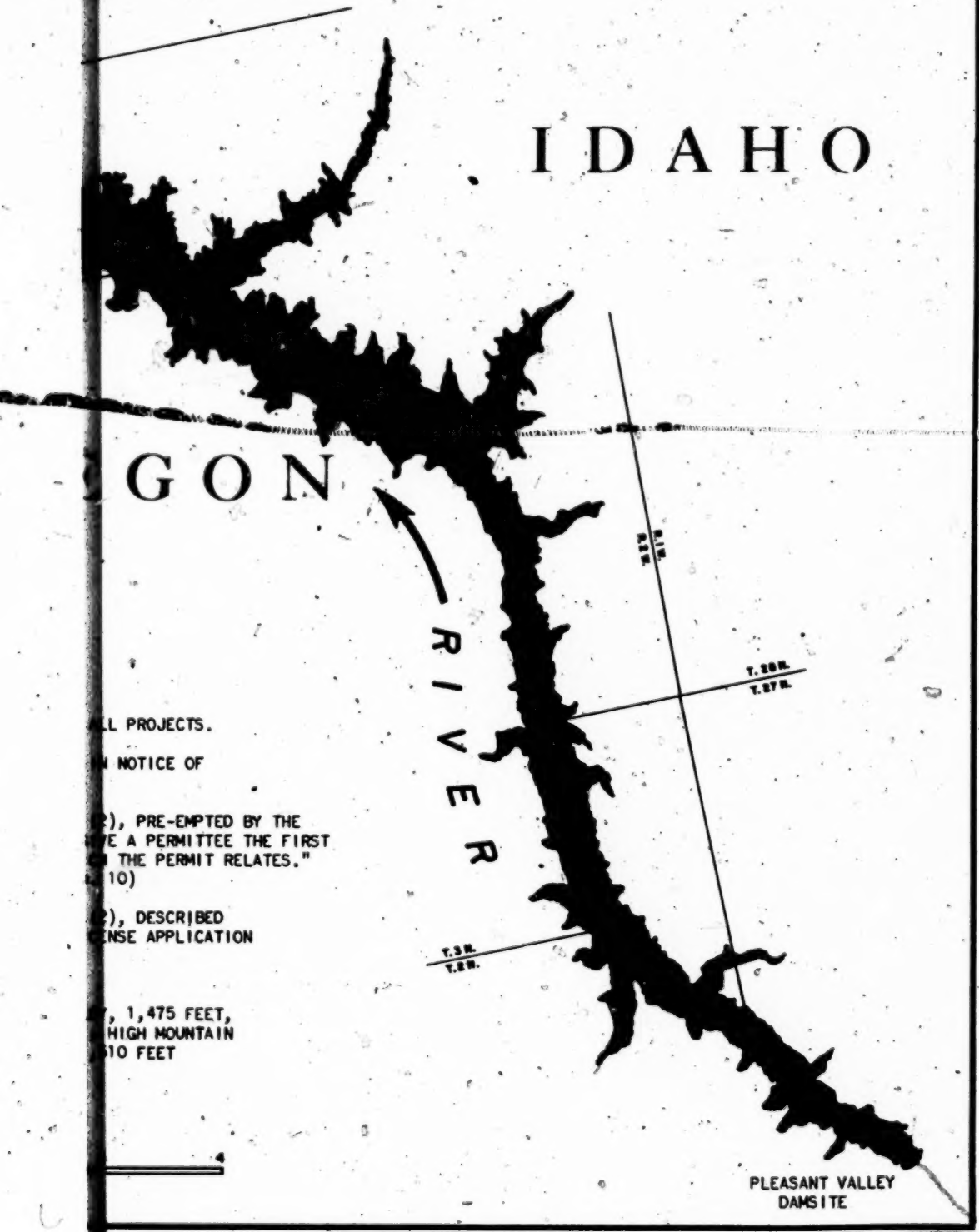
RESERVOIR ELEVATIONS (M.S.L.): PLEASANT VALLEY, 1,475 F LOW MOUNTAIN SHEEP, 1,108 FEET (II R. 810-11); HIGH MOUN SHEEP, 1,510 FEET (I R. 238-39); NEZ PERCE, 1,510 FEET (II R. 445).

SCALE IN MILES

1 0 1 2 3

UNTAIN SHEEP CONTROVERSY

utlined portion of map A



LL PROJECTS.

N NOTICE OF

2), PRE-EMPTED BY THE
E A PERMITTEE THE FIRST
THE PERMIT RELATES."
10)

2), DESCRIBED
NSE APPLICATION

, 1,475 FEET,
HIGH MOUNTAIN
10 FEET

QUESTIONS PRESENTED

The Circumstances: [1]

Washington Public Power Supply System[1a] (hereafter "Public Power"), a public agency of the State of Washington, and Pacific Northwest Power Company (hereafter "Company"), privately owned, are competing applicants for a license under the Federal Power Act for a hydroelectric project at the High Mountain Sheep site on the Snake River. Section 7(a) of the Act grants preference to the license application of a municipality "... where no preliminary permit has been issued." The Federal Power Commission, dividing 3—2 (Chairman Swidler and Vice Chairman Black dissenting), rejected Public Power's claim to a preference under Section 7(a) and licensed to the Company the power development which Public Power proposed for this site, much larger than any proposed by the

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[1] See the two maps opposite.

The lesser area in two shades of red on Map A is that embraced in the Commission's notice to public agencies of the limited effect of the proposed permit upon their preference rights (a statutory prerequisite to issuance of a permit: Section 4(f)). It excludes our site. The greater area in blue on Map A is that in which the statutory preference was nullified, ab initio, by the permit's issuance if the Commission's majority is now correct. Map B shows the difference between the area the Company claimed under its permit (red) and the additional area it claims under its present license application (blue), as disclosed in the Commission's statutory notices to public agencies. These are Appendixes D and E to this brief. The area above Pleasant Valley, shown on Map A, is omitted from Map B, being substantially identical in both notices.

[1a] The Supply System is a "joint operating agency" composed of 16 public utility districts serving power in 16 counties containing about half of Washington's population. It is a "municipality" as defined in Section 3(7) of the Federal Power Act, App. A, p. 1a. So held below: II R. 671.

Company.[2] The majority did so on the sole ground that Section 5 gave the Company "priority" as holder of a preliminary permit under Section 4(f), nullifying Public Power's preference. This "priority" was found notwithstanding the undisputed facts:

(1) The permit had been issued for the investigation of a different project enclosed by stated boundaries (*red;* maps, opp. p. 3) which excluded this site;

(2) The statutory notice to affected public agencies, a prerequisite to issuance of a permit, required by Section 4(f), was similarly restricted (*infra,* pp. 9, 30, 31);

(3) The permit stated that its "sole purpose" was to maintain priority for a future license application on *that* project, specifically detailed (*infra,* p. 10), and not the project ultimately licensed to the Company; and

(4) The Commission, in another proceeding, had rejected the Company's license application on the project described in the permit, before the present license application was filed (*infra,* p. 59).

The Court of Appeals nevertheless affirmed (IV R. 372).

The question presented, stated in statutory terms, is:

When the Federal Power Commission, in compliance with Section 4(f) of the Federal Power Act, notifies

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[2] The dams and reservoirs were about alike, impounding water up to Hells Canyon Dam (Map A), but the power development proposed by Public Power was about 30 percent larger than the Company's. See comparison at p. 8, n. 6, *infra.*

states and public agencies of the pendency of a company's application for a preliminary permit for the investigation of specified sites for a hydroelectric project with exactly defined boundaries, and thereafter issues that precise permit, does Section 5 nevertheless vest in the permittee ab initio an implied "first right" to a license upon all conflicting sites outside the permit's stated boundaries which are better adapted than his own to the comprehensive development of the river so that, upon his later exercise of this option, the preference rights which Section 7(a) grants to states and municipalities are retroactively nullified, without intervening notice, with respect to all such exterior sites which the permittee may elect to substitute for those encompassed by his permit?

This question is briefed at pp. 23-53, *infra*.

The petition stated (p. 5, n. 5) that should certiorari be granted, the petitioner requests the privilege of also briefing and arguing the following questions, on which Chairman Swidler and Vice Chairman Black also dissented:

Whether the permit terminated as a matter of law when the Commission, in an earlier proceeding, denied the Company's application for a license on the project described in the permit, and

Whether the permit continued for 18 months after its stated expiration date to confer a priority with respect to the new project now before the Court, which was primarily investigated and designed during that post-expiration period. These questions are briefed at pp. 53-65, *infra*.

STATEMENT OF THE CASE

The "High Mountain Sheep" damsite, in controversy here,[3] is on the Snake River, the boundary between Oregon and Idaho, about 15 miles upstream from the point where the river enters Washington. It is above the junction of the Snake and Salmon Rivers, and below the mouth of the Imnaha River. (See maps, opp. p. 3.) The Snake is navigable at this point and public lands of the United States are involved. Public Power claims a preference to a license under Section 7(a) of the Federal Power Act. The Company claims priority to a license under Section 5 as holder of a preliminary permit under Section 4(f).

As the court below said:

> "This statutory provision [Sec. 7(a)] undoubtedly gave the Public Power System preference over Pacific Northwest (provided its application met all requirements) if no preliminary permit had been issued."[4]

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[3] The High Mountain Sheep site (maps opp. p. 3) is second choice for both applicants. The Company first applied for a license on the smaller upstream low Mountain Sheep-Pleasant Valley two-dam project. When that application was rejected, it filed its present application on High Mountain Sheep. (*Infra*, pp. 54-56.) Public Power first filed a license application on the larger Nez Perce project, downstream, below the confluence of the Salmon, but amended to substitute High Mountain Sheep when difficulties of safeguarding anadromous fish runs in the Salmon River appeared too formidable for early solution. (II R. 683, para. F.)

[4] IV R. 375. The Commission specifically refrained from deciding any other issue with respect to Public Power's application, saying that further hearings would be necessary "in the event our decision on priority is adjudged to be erroneous" (II R. 655; *cf.* II R. 641, 661, 669).

No permit purporting to encompass the High Mountain Sheep site was ever issued to the Company.

The permit tendered here by the Company,[5] the only one ever issued to it, bears no resemblance whatever to the project described in its present license application. The permit embraces a two-dam project with stated boundaries which exclude the High Mountain Sheep site by several miles. High Mountain Sheep dam would be located below the mouth of the Imnaha River, flooding 10 miles of an important tributary, whereas the permit's two dams are above the Imnaha. High Mountain Sheep dam would be 3.7 miles downstream from the nearer of the two permit dams, 24 miles below the other. High Mountain Sheep, 670 feet high, would be 415 feet higher than the nearer, 136 feet higher than the other. High Mountain Sheep would create a reservoir with seven times the useful storage capacity, twice the total installed generating capacity of the two permit dams. There is, of course, still less resemblance between Public Power's even larger High Mountain Sheep

[5] The project encompassed by the permit is described in the statutory notice of the application therefor (II R. 810-11), printed as Appendix D to this brief. The project proposed by the Company's present license application is described in the statutory notice of that application (I R. 238-39), printed as Appendix E. Map B opp. p. 3 shows in red the area covered by the permit notice, in shaded blue the additional area covered by the license notice, below Pleasant Valley damsite. Above that site the differences in reservoir elevations and areas are not consequential.

power development and that described in the permit. The comparison appears in the margin.[6]

The disparity between the Company's permit and its present license application came about in this way:

What the permit granted.

In 1954 the United States Corps of Engineers and Bureau of Reclamation published a report of their investigation of the Pleasant Valley-Mountain Sheep Project on the Middle Snake River (S. Doc. 51, 84th Cong., 1st Sess. (1954)). The Corps proposed a two-dam project, a low dam just above the confluence of the Snake and Imnaha, another dam about 21 miles farther upstream.

The Company, on October 25, 1954, filed an application for a preliminary permit to investigate that exact project (red, on Map A, opp. p. 3) (I R. 141).

The Corps had previously published similar reports on potential projects to develop the High Mountain Sheep site, here in controversy, located between the mouth of the Imnaha and the Salmon, as well as on the Nez Perce site, located just below the mouth of the

---

[6] Comparison of Projects

Dam	Height (feet)	Installed Capacity (kilowatts)		Useful storage (acre-feet)	Top reserv elevat (m.s.
		Initial	Ultimate		
High Mountain Sheep (Public Power's)	670	1,200,000	2,000,000	2,250,000	1,51
High Mountain Sheep (Company's)	670	875,000	1,750,000	2,250,000	1,51
Low Mountain Sheep	255	282,000	376,000	46,000	1,11
Pleasant Valley	534	720,000	864,000	500,000	1,49

Sources: Public Power's High Mountain Sheep project, II R. 338-39; Compan High Mountain Sheep project, II R. 333-34, 614-15; Low Mountain Sheep and Pleas Valley dams, II R. 838.

Salmon (H. Doc. 531, 81st Cong., 2d Sess. (1948)). The Company never applied for a permit to investigate either of those projects. The reason why the Company selected the Corps' new low-dam project, upstream from the Imnaha, appears in the record:[7] the Company wanted, at all costs, to avoid a controversy with fishery interests who insisted that migratory fish following the Salmon and Imnaha Rivers could not be passed successfully around or through high dams blocking those streams.

Thus were avoided the Scylla of controversy with the fishery people, the Charybdis of controversy with the public power people, both of whom would have been aroused by a permit application for a high dam at Nez Perce or High Mountain Sheep sites.

The Commission gave the notice of this permit application to public agencies, as required by Section 4(f), December 16, 1954 (II R. 810), and ordered it published in the affected counties (II R. 807-08, 808-09). See Appendix D to this brief. It also sent notice to the Secretary of the Interior, as required by Reg. 4.81. The notice to public agencies is crucial. (See Part II of this brief.) It disclosed only the project shown in red, not any project shown in blue, on the maps opposite p. 3, *supra*.

It is clear that no notice was ever given to anyone at any time that a priority for a future license application on the High Mountain Sheep site was sought by the Company's application for a preliminary permit on the Low Mountain Sheep-Pleasant Valley sites.

No one protested; no one else wanted the low-dam Mountain Sheep-Pleasant Valley sites. No one knew that the High Mountain Sheep site was being preempted because the notice did not disclose that.

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[7] I R. 213.

The permit accordingly issued April 8, 1955, to expire March 31, 1958 (I R. 151, 159). Identified as Project 2173, it is not a permit to occupy and investigate all sites in a long "reach" of a stream, but to occupy and investigate two specified sites only, i.e., the specific project[8] just reported on by the Corps (S. Doc. 51, 84th Cong., 1st Sess. (1954)).

The permit states:

> "(A). This preliminary permit is issued . . . for the sole purpose of maintaining priority of application for a license for Project No. 2173 . . . ."[9]

The permit thus purports to give only a geographically restricted privilege, excluding the High Mountain Sheep site, exactly what the Company had applied for (I R. 141), *and exactly what the Commission had disclosed as the scope of the permit in its statutory notice to public agencies* (II R. 810; App. D) *whose preference rights would be cut off by its issuance.*

The permit for Project 2173 was never amended to include the High Mountain Sheep site.[10]

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[8] The permit refers to this specific "project," No. 2173, some 21 times. It refers to specific sites 5 times, e.g., to "the two power sites as initially investigated by the Corps of Engineers and the Bureau of Reclamation" (I R. 154), the "two developments," the "two dams" *(id.)*. It requires cooperation with the Corps and the Bureau "with the object of determining a plan of development *for the two sites* best adapted to a comprehensive plan of development of the water resources of the Snake River" (I R. 157). (Emphasis added.)

[9] I R. 155.

[10] Reg. 4.84 provides, in part: "If an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application." App. B, p. 18a.

The Company subsequently applied for a license on the project covered by the permit, Project 2173 (Map A, *red*), and the Commission, after hearing, rejected that application on its merits.[1] The Company did not petition for review under Section 313(b).

What the Company now claims under that permit.

On March 31, 1958, on the last day of the permit's three-year period, the Company filed a license application on the High Mountain Sheep site in skeleton form, but was unable to complete it until some 18 months later.[2] Not until then (October 26, 1959) was the Commission able to describe the project in a new notice to public agencies (I R. 238-39), required by Section 4(e).[3] It is reproduced as Appendix E to this brief.

Did the 1954 notice to public agencies of a permit application give them at that time fair warning of intent to apply for a license on the sites and areas described for the first time in the 1959 notice of a license

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[1] II R. 833, 862, 863. See Part VIII of this brief. The grounds were that any combination of projects which excluded the Nez Perce site, below the confluence of the Salmon, was inferior to any combination of projects which included that site. The present decision holds that High Mountain Sheep is the better site for comprehensive development because of conflict of Nez Perce with the Salmon River fishery. We do not contest this phase of the decision. The contest is solely over the right to develop the High Mountain Sheep site.

[2] The bizarre circumstances are stated *infra*, pp. 56-57.

[3] Section 4(e) requires: "That upon the filing of any application for a license *which has not been preceded by a preliminary permit* under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection." (Emphasis added.)

application? If not, the statutory preference of public agencies on the High Mountain Sheep site was never nullified, and this case is at an end.

The question is answered by comparing Appendix D (the permit notice) with Appendix E (the license notice); or, more graphically, comparing the area below Pleasant Valley in red on Map B opposite p. 3 (the permit notice) with the added area in shaded blue on that map (the license application notice). The comparison speaks for itself.

No question of Commission expertise is involved.

All agree now that the High Mountain Sheep site, not Nez Perce as initially proposed by Public Power, or Low Mountain Sheep-Pleasant Valley sites as initially proposed by the Company, is the project best adapted to the comprehensive development of the waterway.[4]

All agree now that the project "best adapted to a comprehensive plan of development" is the large High Mountain Sheep project proposed by Public Power, not the smaller High Mountain Sheep project proposed by the Company's license application. While the Company's High Mountain Sheep project was better than its rejected Low Mountain Sheep-Pleasant Valley project, it was markedly inferior to Public Power's proposed High Mountain Sheep project. Public Power presented plans for an initial development 30 percent larger, an ultimate capacity 14 percent larger,

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[4] II R. 672, 686.

than the Company's High Mountain Sheep development.[5]

The Commission's original opinion in the present case approved the Company's smaller power development.[6] But on rehearing the Commission said:[7]

> ". . . to avoid any possible ambiguity, we are modifying our order to describe the project works at the HMS site; which, on the basis of present information, *we find to be best adapted to a comprehensive plan of development under the test set forth in Section 10(a) of the Act.*" (Emphasis added.)

The Commission accordingly substituted a new project description in its order on rehearing. *It is exactly the description of the larger power development proposed by Public Power.*[8] The Commission nevertheless licensed our project to the Company,[9] solely in response to the supposed compulsion of the permit.

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[5] Public Power's project comprised an initial installation of six units of 200,000 kw. each (1,200,000 kw. altogether) with provision for four additional such units (*i.e.*, an ultimate installation of 2,000,000 kw.) (II R. 615). The Company proposed a much smaller High Mountain Sheep power development, with a different design: an initial installation of five units of 175,000 kw. each (875,000 kw. altogether), with provision for five additional such units, *i.e.*, an ultimate installation of 1,750,000 kw. (II R. 614-15).

[6] II R. 673-74.

[7] II R. 796-97.

[8] II R. 799-800, *cf.* description of Public Power's project at II R. 445, 615-16.

[9] II R. 800.

The Commission Majority's Rationale.

The majority's rationale was:

> "... the statutory intent of these provisions is to give a permittee the first right to develop that reach of a river to which the permit relates." (II R. 643.)

It referred to the "common reach" (II R. 621 n. 10) as extending from China Gardens damsite 75 miles up the Snake River to Hells Canyon dam, and 60 miles up the Salmon River to Freedom damsite. These are shown on Map A, opp. p. 3. Thus the permit, although identifying only two damsites and the reservoir areas shown in red on that map, on the Snake River upstream of both the Imnaha and Salmon Rivers, is held to have given the permittee the "first right" to a license on all damsites affecting the additional area shown thereon in blue, extending 60 miles up the Salmon and 10 miles up the Imnaha, and displacing the public preference on all of them. For illustration, on the majority's premise, the Company thus had a "first right" to develop the Nez Perce site on the Snake, as Chairman Swidler points out (II R. 700). This would have inundated the whole area on the Salmon, the Imnaha, and the Snake, shown in blue on Map A, plus that shown in red. Or, in the alternative, the Company had a "first right" to a license to develop the Lower Canyon site on the Salmon,[10] inundating the area shown in blue on that stream. Or, in the alternative, it had a "first right" to a license on the High Mountain Sheep site, developing the power potential of

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[10] The Commission compared the Nez Perce and High Mountain Sheep projects on the assumption that if High Mountain Sheep were licensed, the Lower Canyon dam on the Salmon would be built too, in the future (II R. 622, 627-28).

both the Snake and Imnaha. This was the one the Company selected, flooding the area shown in blue on Map B in addition to the permit's reservoir area. But, according to the majority, the permit on the two inferior sites (Low Mountain Sheep and Pleasant Valley) had given the Company ab initio a first right on all of these distant superior sites, nullifying the public preference on all such alternative sites on all three rivers from the date of the permit's issuance, irrespective of the one finally selected.

The Minority's Rationale.

The minority's rationale (II R. 695) was:

> "The preliminary permit is the means designated by Congress for initiating a hydroelectric license proceeding and municipalities are entitled to a preference for permits as well as for licenses. It cannot be assumed that Congress intended that the permits, which are the sole means of extinguishing their preference rights, were to be awarded in such vague and uncertain terms that preference agencies would have no notice that their preference interest in particular locations was involved in a permit application. At any rate, the permit granted to PNPC was not vague and uncertain, but was definite and limited. The statute impels the conclusion that a permit should not be broadened beyond its terms for purposes of defeating the statutory preference to a license."

The Court of Appeals decision.

The Court of Appeals affirmed (IV R. 372), adopting the Commission majority's construction of the statute, primarily in misplaced reliance on *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111 (1944), and the dissenting opinion in *Inter-*

state Commerce Comm. v. *J-T Transport Co.*, 368 U.S. 81 (1961).

The consequences.

Nearly all of the Nation's future hydro-development, with potentially more than two and one-half times the capacity of all the country's hydro projects now in existence, will involve federal lands or navigable streams, and will therefore be controlled by the permit and license system of the Federal Power Act as construed in the case at bar.[1]

As Chairman Swidler's dissent put it:

> "This case represents the first direct legal contest concerning the construction of section 7(a) in relationship to sections 4(f) and 5. In this benchmark decision the majority of the Commission proposes to interpret sections 5 and 7(a) in a manner which gives the priority of a preliminary permit great and elastic reach while narrowly circumscribing the scope of the preference clause. They have done violence to the statute on both scores." (II R. 711.)

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[1] FEDERAL POWER COMMISSION, HYDROELECTRIC POWER RESOURCES OF THE UNITED STATES, DEVELOPED AND UNDEVELOPED, January 1, 1964, p. xi.

The Federal Power Commission has reported that as of January 1, 1964, the undeveloped hydroelectric resources of the United States comprised 1,711 new sites with potential installed capacity of 115,733,891 kilowatts. These are located in substantially every major river basin in the Nation. For comparison, the hydroelectric projects heretofore developed comprise 1,602 sites with 40,230,291 kilowatts of installed capacity.

The statistics given above do not include the very large potential development of pumped storage projects to which the Federal Power Act is held applicable in Federal Power Commission v. Union Electric Co., 381 U.S. 90 (1965).

For a discussion of the magnitude of the Nation's potential pumped storage development, now in its infancy, see FEDERAL POWER COMMISSION, 1 NATIONAL POWER SURVEY, pp. 124-26 (1964).

SUMMARY OF THE ARGUMENT

The Federal Power Commission, rejecting Public Power's claim under Section 7(a) of the Federal Power Act to a preference right to a license on its High Mountain Sheep project on the Snake River (which the Commission found superior to the project proposed by the Company for that site), licensed Public Power's larger project to the Company on the sole ground that the site was embraced in a preliminary permit which had been issued to the Company under Section 4(f), although for a different project at a different site.[1]

The decision is wrong for two basic reasons: (1) the Company's only permit, never amended, purposely excluded the High Mountain Sheep site when issued in 1955 (see Parts I-VII of this brief); (2) the permit, whatever it embraced, was dead when the Company finally, in 1959, filed the new license application now before the Court (see Part VIII).

The new project for which the Company now seeks a license (a single high dam below the junction of the Snake with the Imnaha River) bears no resemblance whatever to the project for which it asked and received a preliminary permit (two low dams upstream from the Imnaha's confluence). The permit, on its face, excluded the High Mountain Sheep site by 3.7 miles, as

[1] The two maps opposite p. 3 show the conflict.

did the map of project boundaries. It is not necessary to parse the permit to discover this. The Company itself carefully excluded the High Mountain Sheep (HMS) and Nez Perce sites from its permit application, to avoid a host of conflicts. As Chairman Swidler's dissent puts it, "It is dispositive of the whole case that [the Company] never sought—indeed, that it deliberately avoided seeking—a preliminary permit for HMS." The permit is just as explicit as the Company's application. It was never amended to include High Mountain Sheep. When the Company applied for a license on the project described in the permit, the Commission rejected it, as proposing an inferior development of the river's resources. The Company did not ask to amend that license application or this permit, but filed this new license application on the site excluded by the old permit.

Nevertheless, this geographically restricted permit for a project adjudged unworthy of a license in 1958 was held by the lower court to have given the Company from the beginning, in 1955, a "first right" to develop all conflicting sites outside the permit's boundaries which affect the same reach of the river. The effect is to retroactively destroy, in 1965, without intervening notice, the statutory preference of public agencies to licenses for superior projects at all those exterior sites as though the permit boundaries had included them when issued in 1955, instead of specifically excluding them.

To accomplish this result, the majority of the Commission and the court below had to read into the Act what is not there: a silent grant to the holder of a

permit, although issued only for investigation of a specific project, with restricted boundaries, an option to transfer his priority to any other projects affecting substantially the same reach of the river, retroactively inflating the scope of the permit to include the expanded area and the new site. Such a construction of the Act is at war with its language, its legislative history, and the purpose of the whole mosaic of public-resource laws of which the Federal Power Act is an integral part. It is in hopeless conflict with this Court's decisions strictly construing grants of private privileges in public lands and navigable waters. Never before has a grant been read as bestowing on the grantee more than his grant disclosed, indeed more than he ever applied for.

By contrast, the majority, and the court below, read out of the Act what is emphatically there: its requirements of exact notice to public agencies of the scope of permit applications which, if granted, cancel their preference rights. To protect public agencies, Section 4(f) makes this notice to them a condition precedent to the Commission's power to issue any permit at all. If the notice given them in this case in 1954 was intended to give warning that the permit applied for, if granted, would nullify their preference on High Mountain Sheep project, then, in Chairman Swidler's words, it was a "false and misleading notice." If it was not intended to do so, then the Commission has retroactively expanded the permit, without intervening notice to anyone, and it has no statutory power to do this. Specificity in a notice which segregates navigable waters from the public domain for private gain is as important as specificity in a notice which withdraws

public lands for the same purpose. Here, the Commission concedes the latter, denies the former, although the notice which it gave public agencies for the first purpose was identical with the notice which it gave the Secretary for the second. The Commission's distinction between the two is specious.

The Commission's construction of the privilege conferred by a permit, if sustained, will put into "deep freeze" the development of every river basin in which a permit is issued for the investigation of a single inferior project. This is because the permittee's option to transfer the priority of his permit to a conflicting site, which the permit purports to exclude, will make fruitless the investigation of such exterior and superior sites by all competitors, public and private. Their own superior plans for better sites can be preempted, as in our case, by the permittee's retroactive transfer of his priority to a competitor's better project by the exercise of his unrecorded option at the expiration of the period of his permit.

The decision would make a shambles of all river basin planning by federal and state agencies for the multiple uses of a river's resources, in execution of the network of water-resource statutes of the past decade. The scope of the permittee's option is unascertainable by any agency from any public record, or even by inquiry addressed to the Commission, since the Commission cannot find this out itself until the permittee discloses his selection, at the end of the permit's period. (Here, this disclosure was not fully made until eighteen months after the permit expired.) Meanwhile, sites on major tributaries are locked up (*e.g.*, the Salmon and Imnaha in our case) because the option includes damsites below their mouths, even though the site the permittee finally chooses is upstream.

The *Hearst* rule, invoked by the court below, does not enable the Commission to arrogate to itself powers which Congress withheld, and to exercise these under the guise of statutory construction. There is a stark difference between the power to legislate and the power to enforce legislation. As we have seen, the Act conditions the Commission's whole power to issue any permit at all on (1) prior issuance of notice to public agencies, and (2) inclusion in that notice of the substantive contents required by the statute, *i.e.*, accurate disclosure of the areas affected. This notice limits the scope of the permit's lethal effect on the statutory preference for public development of public resources. The Commission here nullifies both facets of the statutory condition precedent: (1) no prior notice was ever given to anyone that a priority would be claimed on the High Mountain Sheep site if this permit issued; and (2) the notice which was in fact given was for a different project at a different location, specifying boundaries which excluded our site. In the teeth of that restricted notice, excluding High Mountain Sheep, the Commission could not have lawfully issued the Company a permit embracing that site. What would be an unlawful grant if stated explicitly is not made lawful by the substitution of an implication. This being so, the Commission cannot now issue the Company a license on that same site in defiance of Public Power's statutory preference, on the sole ground that the site was indeed embraced by that permit. The most avid application of the *Hearst* rule could not empower the Commission to repeal the notice requirements of Section 4(f), to change red into blue on the map which contrasts the area included in the prerequisite notice with the area excluded by that notice but now claimed by the Company, and, having done all this, to retroactively re-

write its grant to the advantage of the grantee and the destruction of the preference ordered by the statute.

Even if the statute is read as giving the permittee more than the permit says that it gives, this particular permit came to an end (together with its asserted penumbra of implied privileges) before the Company's present license application was filed. The permit conveyed no posthumous priority, either within its stated boundaries or, a fortiori, outside them. The life went out of it in 1958 when the Commission rejected the Company's application for a license on the sites and areas covered by the permit, on grounds which specifically precluded an amendment of either the permit or the rejected license application to transfer them to the High Mountain Sheep site. The Company did not petition the court for review, and consequently the decision became res judicata, whether its grounds were right or wrong. When the Company thereafter filed the present license application encompassing the prohibited area, on which the Commission had decided that no license could issue under the same permit, its new license application was a new concept, deprived by the Commission's adjudication of any priority, any umbilical nourishment, from the dead permit.

But even if the permit had nine lives, its maximum statutory period had expired eighteen months before the Company filed a license application on the High Mountain Sheep site which belatedly conformed to the statute and the conditions of the permit. This was unavoidable, because the Company did all of its significant work on this project after, not before, the permit's maximum term of three years had expired.

This case and the companion case of the Secretary of the Interior should be reversed and remanded.

ARGUMENT

INTRODUCTION

The Federal Power Act grants Public Power a mandatory preference right to a license for its High Mountain Sheep project unless the Company's permit (1) encompassed that site as a matter of law ab initio when issued in 1955, even though issued for a project which purposely excluded that site, and (2) was still in force in 1959, when the Company, 18 months after the permit expired, at last filed a license application which supplied the information which the statute and regulations required but which its last-day "application" could not furnish. The permit fails both tests. The first point is covered in Parts I-VII, the second in Part VIII below.

I. THE ONLY PRELIMINARY PERMIT EVER ISSUED TO THE COMPANY EXCLUDED THE HIGH MOUNTAIN SHEEP SITE FROM ITS BOUNDARIES, PURPOSELY AND EXPLICITLY.

The question of whether the permit was intended to include the High Mountain Sheep site need not detain us. The permit was intended by the Company and by the Commission to exclude that site for a reason candidly stated by the Company to the Commission in 1959, after the permit had expired:

> ". . . Structures *below the mouth of the Imnaha River*[1] were not earlier investigated because, in the judgment of the applicant, *fish passage devices had not been developed which would permit licensing of major structures obstructing runs of anadromous fish.*" (I R. 213; emphasis added.)[2]

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[1] (Our footnote.) This is where the site now claimed is located. See maps opposite p. 3.

[2] The Company's six semi-annual progress reports required by Article 9 of the permit (I R. 156) substantiate this. None of them mentions any work at all on the High Mountain Sheep site here in controversy. (II R. 823-32.)

The Company avoided proposing a high dam at Nez Perce, which would block fish runs up the Salmon, and it avoided proposing a dam at the High Mountain Sheep site because that would block the Imnaha River runs. The Company therefore explicitly excluded both the Nez Perce and High Mountain Sheep dam sites from the "sites and areas" described in its permit application (I R. 141), and from the detailed map which the regulations required it to file with that application (I R. 149-50). It seized, instead, on the scheme proposed in the new Corps of Engineers report (S. Doc. 51, 84th Cong., 1st Sess. (1954)), for two low dams upstream from both those tributaries, and applied for exactly that project. It thus escaped the High Mountain Sheep battleground by 3.7 miles, and the Armageddon at Nez Perce by about 5. The Commission did exactly the same thing in the notice of the permit application which Section 4(f) required it to give to public agencies (Appendix D to this brief; II R. 810), in the notice which the statute required it to publish in the affected counties (II R. 807-09), and in its notice to the Secretary of the Interior under Sections 4(f) and 24 of the Act (Reg. 4.81). The areas in red on our maps opposite p. 3 correspond to those notices. And so, when the Commission came to issue its order granting the permit, it preceded this order with findings (I R. 154-55) which recited this application, this very notice, all restricted to this same defined project, No. 2173. The order purposely excluded from the permit the High Mountain Sheep site and the Nez Perce site, both of which would have got the Company into trouble. The end product, the Commission's order issuing the permit, thus restricts its effect to "the *sole purpose* of maintaining priority of application for a license for

Project No. 2173" (I R. 155; emphasis supplied), and this was a project it carefully defined "as described in the application," repeating the Company's precise description.

Indeed, the Commission could not have lawfully issued the Company a permit embracing the High Mountain Sheep site, in the teeth of its prerequisite notice and findings, and of course it did not do so.

But the Commission's majority now reads that permit as giving the Company the "first right" to a license on the very projects that the Company, with the Commission's concurrence, so carefully avoided. If the permit meant that when it was issued in 1955, the Company could have filed a license application on the excluded Nez Perce or High Mountain Sheep sites the week after it was granted, and claimed under that permit a priority on the sites that both it and the Commission deliberately excluded. This is because the permit either encompassed those additional sites ab initio or never encompassed them at all, for the permit was never amended to include the High Mountain Sheep site.[3] But Reg. 4.84 provides:

> "Applications for amendments of preliminary permits shall follow the form prescribed for original applications, as far as applicable. *If an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application.*" (Emphasis added.)

[3] As noted in Part VIII, *infra*, it is clear that the Commission would not, and probably could not, have granted an amendment to either this permit or the license application for Project 2173 to include the High Mountain Sheep site, after rejecting that license application on grounds which proscribed that site as well as those named in the permit.

If ever "sites or areas not covered by the original permit" were involved, this is that case. The regulation was not obeyed.

Chairman Swidler aptly characterizes this:

> "It is dispositive of the whole case that PNPC never sought—indeed, that it deliberately avoided seeking—a preliminary permit for HMS." (II R. 698.)
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> * * * * * * * * *
>
> "In this case PNPC applied for and was granted a permit for the two specific sites and the terms of the permit were completely clear that it was limited to those sites. I do not mean to suggest that the Commission could not grant a permit with a broader scope but it is hard to imagine how a permit could state its limitations any more clearly than was done in the instant case." (II R. 699.)

The majority's action is not judicial interpretation of a permit, but judicial substitution of a new one that the Company never dared ask for, with results disastrous to helpless third parties.

The permit which was in fact issued gave the Company no rights in sites and areas which it excluded unless the statute itself gives every permittee more than his permit says that it grants. To this point we next turn.

II. THE ACT DENIES AUTHORITY TO THE COMMISSION TO DESTROY THE STATUTORY PREFERENCE OF PUBLIC AGENCIES BY RETROACTIVELY EXPANDING A PERMIT'S PRIVILEGES BEYOND ITS DISCLOSED BOUNDARIES, AS IT DID HERE.

The statute contains safeguards for public agencies, written to prevent exactly this danger. The Commission, ignoring these restrictions, has exceeded its statutory powers.

A. The statute grants a permittee nothing outside the permit's stated boundaries.

A permit is a limited grant of privileges in public lands and navigable waters, given for a limited purpose.

Section 4(f) contains the whole delegation of authority to the Commission,[1] and Section 5 states the permit's sole function.[2]

A preliminary permit for the investigation of a specified project grants two important privileges to the holder: (a) he gets a priority to a license upon that project within (but only within) its boundaries, as originally specified or as duly amended after notice to affected public agencies (Reg. 4.84); (b) the Commission assures him that it will not process an application by someone else for a license on a conflicting site on the

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[1] "To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: . . . ."

[2] "Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. . . ."

same reach of the stream outside his permit, until he files his own license application (Reg. 4.30). But the permit is a shield, not a sword; the statute does not grant the permittee a *priority* to a license upon conflicting sites outside his permit's boundaries; to the contrary, if the competing license applicant on the exterior site is a public agency, its statutory preference is unaffected, and must be respected whenever the permit holder gets around to filing his license application on the project which his notice and permit encompassed, and thereupon comes into competition with projects proposed by others for sites not encompassed by his permit (and prerequisite notice).

The regulations (Reg. 4.81, 4.82) enforce great specificity in the description of the boundaries of the project for which a permit is sought. They parallel, in this respect, all statutory grants of privileges in the public domain (*infra,* pp. 42-46), but there are special reasons for doing so with respect to Federal Power Act permits, as we shall see next.

B. To protect the preference rights of public agencies, the statute restricts the effect of a permit to the boundaries proposed in the notice the Commission must give them.

Section 4(f) imposes a condition precedent upon the Commision's power to issue any permit at all: prior notice to affected public agencies (and publication thereof) accurately disclosing the geographical scope of the proposed permit.

The reason for specificity in the notice to public agencies is plain: if a permit issues, the preference to public agencies is neutralized, once for all, then and there, *on the project covered by the permit.* The preference cannot be revived later at the licensing stage. But a public agency, fairly warned by adequate notice

of a permit application, may itself file a permit application on the threatened site. Its preference right to a permit is mandatory and unconditional. *This is the pivotal importance of the retroactive expansion of the permit given in this case.* The statute intends that the notice of the permit application must explicitly describe what the permit would preempt; conversely, nothing excluded by the notice is acquired by the permittee. This is shown by Section 4(e) of the Act, which requires no notice at all to a public agency of a company's license application if (and *only* if) that application was preceded by a preliminary permit (paralleling exactly the condition stated in Section 7(a) for recognition of the public preference). Manifestly, this contemplates that the 4(f) notice of the permit application shall disclose *all* of the sites and areas preempted by the permit if its issuance is full quittance for the 4(e) notice of a license application.

The question is not whether the issuance of a permit puts everyone on notice that the permittee hopes to build a project, and that if he does, this will foreclose development of conflicting sites outside the permit area. And the question is not whether the municipality learns somehow "what is going on" *after* the permit issues; it is then too late to revive the public preference. The question is whether the Commission's issuance of notice to public agencies of a permit application for a specific site on a navigable stream puts them on notice that the permittee is to get *an affirmative priority on all exterior competing sites,* as though the notice actually given had included them instead of excluding them, destroying the public agency preference on those undisclosed sites. This is a wholly different question.

The regulations, understandably, are most explicit about this notice. The permit application must be accompanied by a map, whether or not public lands are involved; and if any public lands are included (as they were here) this "shall be on a scale to present effectively a tentative project boundary which shall be the line enclosing all quarter-quarter sections, lots, and other smallest legal subdivisions of public-land survey which may be occupied or used in whole or in part by the project."[3] This was done in 1954; the map excluded High Mountain Sheep by several miles. (I R. 149-50.) The Commission is required to give notice of this precise boundary to affected federal, State, and municipal agencies.[4] This was done (II R. 810); see the notice given in our case in Appendix D. Note the exact description of the area sought by the application, by reference to dam locations and upstream and downstream limits of the reservoirs, and maximum reservoir contours. These again exclude High Mountain Sheep, nearly four miles away in another township. (See maps, opp. p. 3.) A hearing on such a permit application may be demanded by any party in interest.[5] Amendments are provided for,[6] but they require like notice to public agencies if they embrace "sites or areas not covered by the original permit."

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[3] Reg. 4.82, Ex. H and Ex. I, App. B, p. 17a.

[4] Reg. 4.81, App. B, p. 15a.

[5] Reg. 4.83, App. B, p. 18a.

[6] Reg. 4.84, App. B, p. 18a. See p. 25, *supra*.

The conclusion is inescapable that Congress intended that the priority accorded by Section 5 to a project covered by a preliminary permit is to be geographically coextensive with the project described in the notice which Section 4(f) requires to be given to public agencies and published.

C. If the 1954 notice given public agencies was intended to extinguish their preference rights on the High Mountain Sheep site, it was a "false and misleading notice," for it excluded that site. If the notice was not then so intended, the Commission cannot retroactively expand it.

The decision below is wrong because it destroys the public preference in sites and areas excluded by the notice on which they were entitled to rely. They did rely on it here; they successfully defeated the Company's later license application on the inferior low-dam project disclosed in the notice (II R. 834, 862, 863), leaving unscathed (as they were misled to believe) the preference right on the sites for the high dams that public power interests advocated at Nez Perce or High Mountain Sheep sites. Public agencies can no longer know, from reading the notice they receive, what sites are preempted by the permit. They cannot find this out because the Commission does not know either, and will not know until the permittee files his license application, or series of applications, as in this case. An exhaustive study of a whole river basin may be required to determine the interrelationship of various alternative projects, all now held to be preempted by a permit application for only one of them, and a poor one at that. The decision thus scorns the specificity required by the statute and regulations.

Chairman Swidler's dissent forcefully sums up the point (II R. 701-02):

> "The majority's position is unreasonable because of the inadequate notice—indeed, the wholly false and misleading notice—provided by a preliminary permit under this interpretation, and the resulting failure to give potential competing applicants and other interested parties the statutory notice to which they are entitled. This is no mere academic point, as illustrated by the present proceeding. We should bear in mind that Nez Perce was a project which had already been separately identified as a desirable project by the Corps of Engineers and endorsed by many of the preference agencies in this proceeding at the time PNPC applied for the preliminary permit. It is beyond belief that the preference agencies would at that time willingly have acquiesced in the award of a preliminary permit for the Nez Perce Project or for the HMS Project for which they would have been entitled to a preference. . . . Thus, to require specificity in the application, and thereupon to construe it as covering projects not specified, would result in depriving potential preference applicants of an opportunity to preserve the preference rights guaranteed by the statute. I cannot acquiesce in an interpretation of the statute so lacking in fairness."

D. The Commission's rationalization that one preliminary permit has two geographical "scopes" has no support in the statute or regulations.

Section 24 of the Act directs that the mere filing of an application for a permit or license withdraws "any lands of the United States included in any proposed project."

Section 4(f), as we have seen, requires notice of that same application to public agencies and publication in

the counties "in which the project or any part thereof or the lands affected thereby are situated."

Regulations 4.81 and 4.82 implement both Sections 4(f) and 24 by requiring the identical notice to be (1) given to public agencies, (2) published in the local counties, and (3) transmitted to the Secretary. The three notices are carbon copies of each other, and were so in our case (II R. 807-09, 810). They all described the same "project," with the same reservoir contours, as shown in red on our maps opposite p. 3.

Does the statute intend that the withdrawal thus effected against the exercise of the public preference under Section 7(a) shall have a greater geographical scope than the withdrawal which the identical notice effects as against all of the other land laws? The Commission thinks so.[7] A permit thus has two geographical scopes, a definite one with respect to land withdrawals only, a wholly indefinite and unascertainable one with respect to its impact on the public-agency preference.

If the Commission is right in this strange distinction, why, then, the specificity required in the map of the project boundaries denominated Exhibit H by Regulation 4.82? This map, unlike that described in Exhibit I (same regulation), is required even if no public lands are involved. And why the requirements of specificity in the notice to public agencies of an application for a permit, in Regulation 4.81, if the applicant is not obliged to tell them what sites his application preempts? And why the requirement of notice to pub-

[7] "While the detailed description of site in both the application and in the resulting permit enables a sensible program of land withdrawals, we do not believe that this aspect should be or is controlling with respect to the scope of a permit." (II R. 647-48.)

lic agencies of an application for an amendment which "embraces sites or areas not covered by the original permit," in Regulation 4.84, if all conflicting sites were preempted in the original permit?

Moreover, the whole rationale of a distinction between the notice's two functions is creaky. Is it more important that a potential homesteader be notified that specific land is withdrawn, than that potential preference claimants be notified that specific power sites have been preempted, both events being controlled by the mere filing of the same permit application and the mailing by the Commission of carbon copies of the identical notice? And is the public interest in navigable waters less than the public interest in public lands, so that specificity is not required in the appropriation of power sites to private benefit, whereas specificity in the private withdrawal of public lands is concededly compelled by the same statute?

The Commission has no statutory authority to second-guess the public agencies which were entitled to rely upon the notice it gave them of the limited impairment of their preference rights which would be effected by the issuance of the permit described in the notice.

On this point, Chairman Swidler's dissent is devastating (II R. 708-09):

> "The majority's assertion that the precise description of the project in this case relates only to the administration of § 24 of the Federal Power Act is far fetched indeed. It strains the imagination to accept the suggestion that the regulations were drafted exclusively to implement a routine function relating to land withdrawals, but serve no function in defining the scope of a priority which overcomes the rights of preference applicants that

Congress took great pains to protect. Such an interpretation is in direct conflict with the overriding purpose of the Act to protect preference applicants and with the provisions of section 4(f) of the Act which require notice to States and municipalities and landowners in every county affected by a project before a permit is granted. That this reasoning will not hold up is borne out by the records of the Commission which show that no formal power site withdrawal was made in this proceeding, because the maps filed with the preliminary permit were not sufficiently accurate to serve as a basis for a formal withdrawal. The specificity the majority insists is essential for power site withdrawals thus is lacking in this proceeding, and the asserted justification of the majority opinion vanishes."

E. The decision's rationalization of the need for "flexibility" is answered by the Commission's regulations, violated in this case, which require amendment of a permit to add new "sites or areas".

A company desiring priority upon a river's whole "reach" (whatever that word, not appearing in the statute, may mean) has that opportunity under the Commission's regulations. It may apply for a permit for the investigation of all sites in a disclosed area.[8] By such fair disclosure, followed by public notice [9] and hearing,[10] as the regulations authorize, it may obtain in advance (if the Commission decides that the public interest justifies it) a permit which grants the areas and alternative sites desired by the permittee. It may

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[8] Reg. 4.82, App. B, p. 16a. Chairman Swidler so construes the regulations and statutes (II R. 708), and there is no disagreement on this, so far as we know.

[9] Reg. 4.81, App. B, p. 15a.

[10] Reg. 4.83, App. B, p. 18a.

amend its permit to add new sites or areas (Reg. 4.84), but only on similar notice. In our case the Company did not apply for any such options, did not choose to expose them to public notice and hearing and to the risk of a preemptive permit application of a public agency. But the lower court nevertheless reads them into its permit, ex post facto.

In 45 years of administering the Act, the Commission has never promulgated a regulation to create the floating easement that it here bestows.[11]

Chairman Swidler states the fair answer to the "flexibility" argument, which is really the only argument the Commission and the lower court offer for their distention of the permit in this case (II R. 699-700):

> "This is not to say that an applicant must accurately guess in advance of exploratory engineering studies under a preliminary permit the exact results of these studies. No such impossible demands need be read into the Act. Rather, it is the applicant's responsibility to seek an amendment reflecting any significant changes in the scope of the permit which become warranted by the studies. Amendments to preliminary permits are authorized by the Commission's regulations. (Regulations under the Federal Power Act, Section 4.84) Obviously the statutory notice requirements for the protection of preference customers would be meaningless if the scope of a permit were not limited by its words and could be enlarged by uni-

[11] ". . . But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." Federal Trade Comm. v. Bunte Bros., 312 U.S. 349, 352 (1941).

lateral action of the permittee without knowledge of other interested parties whose rights may be affected. . . .

"To be sure, it is desirable that an applicant be allowed flexibility and be encouraged to study all reasonable alternatives, including those not known at the time of application for a permit. The way to obtain this flexibility, however, is by allowance of needed amendments, not by construing permits which purport to cover specific projects as being in effect a charter for a broad stretch of the river, thereby concealing the scope of the permit from the public and interested preference customers."

A permit's boundaries, like a fence, protect the permittee's privileges within the fenced area. But they also fence out the permit's lethal threat, the only threat, to the public preference in the areas which are protected by those same boundaries. "Flexibility," as related to the process of fixing the boundary in the first place, is one thing; dissolution of the boundary so determined is quite another. Even in the former, the statute requires notice and due process. The retroactive ex parte relocaiton of any boundary to the benefit of one neighbor, the disaster of another, is abhorrent to our system of law. It should not be permitted here in the disguise of statutory construction.

III. THE ACT'S LEGISLATIVE HISTORY FORBIDS THE PERMITTEE'S OPTIONS ON THE PUBLIC DOMAIN WHICH THE COMMISSION READS INTO THE STATUTE.

The Commission's majority has exactly reversed the relationship that Congress intended between its dominant policy, preference to public agencies in the development of the Nation's hydroelectric resources, and the sole exception to that policy, when a preliminary permit is in force.

As Chairman Swidler's dissent puts it (II R. 687-88):

> "If the language left any doubt, the legislative history shows that section 7(a) was designated to cover precisely the case before us. Rarely has Congress visualized with such prescience the possibility that the administrators of a statute would attempt to frustrate the Congressional intent, and been at such pains to make clear what it meant. Indeed the Congressional intent that the preference applicant be licensed in the circumstances of this case would hardly have been clearer if Congress itself had designated it as the licensee by name. The Commission's decision is therefore particularly egregious and unfortunate."

This legislative history of Sections 4(f), 5, and 7(a), summarized in Appendix C to this brief, fully sustains Chairman Swidler's conclusion. A few examples suffice here.

A. The legislative history shows a progressive strengthening of the Act's provisions granting preference to public development.

Appendix C summarizes eight steps that Congress took to make sure that public agencies should indeed have preference, by force of the language now appearing in the Act. The policy so implemented was repeatedly stated. Typical examples: Senator (later Vice President) Barkley:

> ". . . what we want is to get section 7 amended so as not to provide that this Commission *may* give preference to municipalities, but that they *shall* give preference to municipalities whenever the conditions are equal or similar."[1] (Emphasis added.)

[1] Hearings, House Comm. on Water Power, 65th Cong., 2d Sess. 814 (1919).

Rep. Doremus, offering the amendment (now in the Act) to change "may" to "shall," as Senator Barkley had urged, said his amendment:

> "... makes it mandatory upon the Commission to grant the license to the State or municipality, if the plans submitted by it are, in the judgment of the Commission, as good as those submitted by the private applicant."[2]

The bill, as enacted, goes further. Section 7(a) assures the public preference:

> "... provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. ..."[3]

B. The legislative history shows increasing restrictions on the effect of a permit on the public-agency preference.

Appendix C summarizes seven steps by which Congress progressively cut down the privileges which a preliminary permit should grant. It is significant that the most extreme assertion of a priority or preference right for a permittee was a proposed amendment say-

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[2] 56 Cong. Rec. 9804.

[3] Note the reverse English put on this language by the Commission's majority. Here the Commission, on rehearing, specifically determined that the 1,200,000 kw. power development proposed by Public Power, 30 percent larger than the 875,000 kw. development proposed by the Company, was "best adapted to a comprehensive plan of development under the test set forth in Section 10(a) of the Act" (II R. 796-97, 799), and substituted Public Power's superior plan for the Company's, which the Commission had approved in its first opinion. (II R. 674.) But the Company was allowed to make its plan as well adapted as Public Power's, simply by expropriating it. It naturally accepted the Commission's offer.

ing he "shall be entitled to a preference right to lease *the lands embraced in the permit.*" (Emphasis added; see App. C, p. 25a.) And even this proposal was defeated (*id.*). No Senator or Congressman ever suggested the Commission's present interpretation that a permit conveys an implied option to transfer its priority to areas outside those which are embraced in its specified boundaries. If there was any doubt about an implied option on a license, Congress removed it in 1935. Until then, Section 5 provided that "each such permit shall set forth the conditions under which priority shall be maintained *and a license issued.*" The Public Utility Holding Company Act of 1935, incorporating the Federal Water Power Act as Title II, amended Section 5 by deleting the italicized words. The House Committee on Interstate and Foreign Commerce explained:

> "A preliminary permit is obviously not intended to carry the right to a license even if the applicant complies with all the conditions of the permit. Omission of these words is calculated to make entirely clear what was undoubtedly the original intention of the law in this regard."[4]

The Senate Committee said:

> "... It was plainly not the intent of the act to have a preliminary permit carry the absolute right to a license, even if the applicant complies with all the conditions of the permit. The quoted words, however, are relied upon in support of the contention that a permit does carry that right. Omission of those words is calculated merely to free the issue from doubt."[5]

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[4] H. Rep. No. 1318, 74th Cong., 1st Sess. 23 (1935). See other citations, App. C, p. 34a.

[5] S. Rep. No. 621, 74th Cong., 1st Sess. 43-44 (1935).

This being true within the area embraced by the permit, it is so *a fortiori* in areas excluded by the permit's boundaries, as here.

C. The Federal Power Act's public preference mandate states a policy reiterated in federal power legislation with which it must be construed pari materia.

Congress, since 1906, and on at least sixteen occasions, has consistently expressed its determination that public agencies should have preference in the development of the Nation's water power resources.[6] The Federal Power Act is to be considered as part of a seamless pattern, which Congress did not intend to be broken. Indeed, some acts, *e.g.*, Section 5(c) of the Boulder Canyon Project Act,[7] have specifically incor-

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[6] Act of April 16, 1906, 34 Stat. 117, 43 U.S.C. § 522; Federal Power Act, sec. 7 of the Act of June 10, 1920, 41 Stat. 1067, 16 U.S.C. § 800; Sale of Power on Salt River Project, Act of September 18, 1922, 42 Stat. 847, 43 U.S.C. § 598; Boulder Canyon Project Act, sec. 5 of the Act of December 21, 1928, 45 Stat. 1060, 43 U.S.C. § 617d(c); Tennessee Valley Authority Act, Act of May 18, 1933, 48 Stat. 64, 16 U.S.C. §§ 831 i, j; Fort Peck Project Act, Act of May 18, 1933, 52 Stat. 405, 16 U.S.C. § 833 c; Rural Electrification Act, Act of May 20, 1936, 49 Stat. 1365, 7 U.S.C. § 904; Bonneville Project Act, Act of August 20, 1937, 50 Stat. 733, 16 U.S.C. § 832 c; Reclamation Project Act of 1939, Act of August 4, 1939, 53 Stat. 1193, 43 U.S.C. § 485 h; Water Conservation and Utilization Act, Act of August 11, 1939, as amended by the Act of October 14, 1940, 54 Stat. 1124, 16 U.S.C. § 590z-7; Flood Control Act of 1944, Act of December 22, 1944, 58 Stat. 890, 16 U.S.C. § 825s; Act of July 31, 1950, § 2, 64 Stat. 382, 48 U.S.C. § 312a (1964); Small Reclamation Project Act of 1956, 70 Stat. 1044, 43 U.S.C. §§ 422a-*l* (1964); Niagara Power Project Act, § 1(b)(1), 71 Stat. 401 (1957), 16 U.S.C. § 836(b)(1) (1964); Flood Control Act of 1958, 72 Stat. 319, 33 U.S.C. § 701b-08a (1964). Accord: Atomic Energy Act of 1954, 68 Stat. 929, 42 U.S.C. § 2064 (1964).

[7] Act of Dec. 21, 1928, 45 Stat. 1060, sec. 5; 43 U.S.C. sec. 617d(c).

porated by reference the preference provisions of the Federal (Water) Power Act. As Attorney General Brownell said, in construing the public-agency preference provision in the Flood Control Act of 1944:

> "I have made this extended reference to the legislative history because it convinces me of the deep concern that Congress had, in making provision for the disposition of federal power, for the preferential status of public bodies and cooperatives. It is clear that it wished generally to continue the policies it had theretofore formulated in other power acts."[8]

Apart as Senator Borah and Senator Barkley may have been from each other politically, or from Attorney General Brownell ideologically, there was unanimity among them that Congress intended, in all these cognate statutes, that preference *shall* be granted to public development of the power resources of the public domain. This decision fractures that cohesive statutory structure, for the first time.

IV. THE COMMISSION'S CONVERSION OF A LIMITED GRANT INTO A FLOATING EASEMENT IS AT WAR WITH THIS COURT'S DECISIONS STRICTLY CONSTRUING GRANTS OF PRIVILEGES IN PUBLIC LANDS AND NAVIGABLE STREAMS.

The effect of the decision is to give the permittee an option or floating easement on navigable waters and public lands outside the permit's boundaries. When exercised, this not only nullifies retroactively the public-agency preference otherwise prevailing outside the area granted to the permittee: its implications go further, cutting off rights of entrymen and locators

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[8] 41 Ops. Atty. Gen. 236, 249 (1955).

who initiated their investment in reliance upon the published notice of the permit's boundaries.[1]

This is the essence of the concept of a "first right to develop that reach of a river to which the permit relates" (II R. 643). To create this concept, the Commission (1) substitutes "reach" for "project" in Section 4(f) (the only section authorizing permits)[2] and (2) transforms "priority" in Section 5 (the only section in which the word appears) from a restriction on the "sole purpose" of a permit *within* its boundaries into a grant of privileges *outside* those boundaries.

This new notion of "flexibility" in a public grant, of rubber boundary lines to be flexed at the grantee's option, obviously conflicts with this Court's decisions strictly construing against the grantee the sovereign's grants of privileges in public lands and navigable waters.

The classic statement of the rule in *Louisville Bridge Co.* v. *United States,* 242 U.S. 409, 417 (1917), applies here:

> "... when private rights of an indefeasible nature are sought to be derived from regulatory pro-

[1] As the Secretary of Agriculture pointed out in his critical comments on the Company's High Mountain Sheep license application, that project would inundate a number of ranches and mining properties in the Imnaha Basin, as well as National Forest roads and stock driveways. (IV R. 227.) These would not have been affected by the project described in the locally published notice of the permit application because the permit dams would have been above the Imnaha. The dates of their investments are not stated.

[2] When Congress intended to use the word "reach" in instructions to the Federal Power Commission it did so. See the Act of August 27, 1964, P.L. 88-491, 78 Stat. 607, forbidding issuance of licenses and permits in the "reach" of the Colorado River between Glen Canyon Dam and Lake Mead.

> visions established in the exercise of this power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised."

That rule has been solidly entrenched, until now. Thus:

> "Such a construction [that a grant of a right of way included minerals] would run counter to the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it. Caldwell v. United States, 250 U.S. 14, 20, 21." *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116 (1957).
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> "... [T]he construction urged by respondent would be precluded by the principle that all federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included." *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 235 (1960).

A century-old case curiously foreshadowing the facts of the present one is the oft-cited decision of *The Charles River Bridge* v. *The Warren Bridge, et al.*, 36 U.S. (11 Pet.) 420, 549 (1837). Construing a charter for a toll bridge at a specific site, and holding that it did not prohibit a franchise for erection of a free bridge at a competing site (i.e., in the same "reach"), the Court said:

> "The inquiry then is, does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none—no words that even relate to another

bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey."

By contrast, the decision below gives the permittee a privilege greater than he applied for or that the Government purported to grant him.

V. THE DECISION'S "RUBBER BOUNDARY" CONFLICTS WITH THE CONSERVATION POLICY OF THE MOSAIC OF NATURAL RESOURCE LAWS OF WHICH THE FEDERAL POWER ACT IS AN INTEGRAL PART, TO BE CONSTRUED PARI MATERIA.

The Federal Power Act is one of many interacting laws governing the multiple uses of the Nation's navigable rivers, its forests and its public lands—laws exercising the plenary powers of Congress over those facets of the public domain. They are to be construed pari materia.

The decision below is in irreconcilable conflict with the permit and licensing systems of the federal land and water laws from which the Federal Power Act was derived, and those which have followed it. No one has ever suggested that the holder of a permit to prospect for minerals,[1] who has failed to find workable

[1] Mineral Leasing Act, 41 Stat. 438, as amended, 30 U.S.C. 201 (1964). This statute and the Federal Power Act were enacted by the same Congress in 1920, and have somewhat parallel historical antecedents as well as internal structures, i.e., preliminary permits followed by licenses or leases.

deposits within the permit, has a "first right" to the structure "to which the permit relates," so that he may try again in another township (as here), without amendment, and claim a lease if he makes a discovery; or that the right to cut timber[2] within specific advertised boundaries in a national forest gives a "first right" to other timber, to be exercised four sections away from the advertised area; or that the holder of a grazing permit[3] which is restricted to specified sections of the public lands may occupy public lands elsewhere, simply because they are better than those granted him; or that a permit to cross the Potomac with a pipeline[4] at 14th Street gives a right to do so at Alexandria, 3.7 miles downstream. Did Congress silently intend a floating easement, an implied option on public lands and navigable waters, in the Federal Power Act alone, as an anomaly in this group of cognate statutes?[5]

VI. THE DECISION FOREBODES DESTRUCTIVE CONSEQUENCES TO THE DEVELOPMENT OF THE NATION'S REMAINING HYDROELECTRIC RESOURCES.

If this decision prevails:

No matter how strictly the permit is specifically bounded, the permittee acquires an exclusive option, without disclosure, *as against both public and private competitors,* upon all conflicting sites which might be better adapted than his own to the comprehensive de-

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[2] Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. § 476.

[3] Taylor Grazing Act, ch. 865, 48 Stat. 1270, as amended, 43 U.S.C. § 315b (1964).

[4] River and Harbor Act of 1899, Sec. 10, 30 Stat. 1151, 33 U.S.C. § 403.

[5] The Act's legislative history, of course, shows no such intent, but the exact reverse. App. C to this brief.

velopment of the river. If any competitor is nevertheless able to formulate a better plan for the development of such a competing site, the permittee has a priority under Section 5 which enables him to expropriate the superior plan proposed by that competitor,[1] as was done in our case. Moreover, all alternative sites—not just the one ultimately substituted—are locked up in this fashion. Some power sites thus sterilized may be below the confluence of tributaries, thus precluding all competitors, public and private, from investigating sites on those tributaries that would be flooded by a dam located below the confluence, even if the permittee ultimately decides against that option and chooses a site above the tributary's inflow, as he did here.[2]

Preclusion of the investigation of all potentially competing projects, whether that investigation is to be carried out by public agencies or by private companies, is not in the public interest, and was not the statutory intent. But it is the result compelled by this decision.

If the decision is not reversed, the "deep freeze" in which all competing sites outside the permit are impounded may paralyze them, not only for the three-year period during which the permittee is making up his mind how far to roam outside his permit, but also during all the subsequent years of the licensing proceedings—in this case eleven years, so far.[3]

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[1] Public Power spent some two million dollars in developing and presenting to the Commission the superior plan now licensed to the Company, which never proposed this large a power development.

[2] See maps opp. p. 3, *supra*.

[3] Rep. Ferris, explaining the permit's purpose, said it was intended to "authorize the occupation of the land" for a limited period, but "will not unduly tie up the property and cold storage it, so to speak." 51 CONG. REC. 13622-23 (1914).

The decision below would make a shambles of all river basin planning by federal and state agencies, by vesting in a permittee an option on undisclosed hydroelectric resources which he never applied for, its extent unascertainable until he exercises that option.

Comprehensive river basin planning necessitates accurate notice of proposed projects to a host of affected federal and state agencies.[4]

Federal and state conservation agencies cannot plan hereafter for the multiple potential uses of a river, its tributaries, its watershed and forests—for example, for municipal and industrial use, reclamation, flood control, fish and wildlife enhancement, recreation, scenic values,[5] rights-of-way—if all these plans are overshadowed by this undefined lien, its grasp understated (as here) in the notice they receive, undiscoverable by any inquiry directed to the Commission during the next three years. Specifically, did this permit encompass the Nez Perce site, thereby appropriating all

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[4] See, *e.g.*, Federal Water Pollution Control Act § 5(c)(4), as amended, 79 Stat. 908, 33 U.S.C. § 466 (1966 Supp.); Federal Water Project Recreation Act, 79 Stat. 213, 16 U.S.C. §§ 460 *et seq.* (1966); Water Resources Planning Act § 204(3), 79 Stat. 249, 42 U.S.C. § 1962b-3(3) (1965 Supp.); Act of October 27, 1965, § 101(a), 79 Stat. 1073, 42 U.S.C. § 1962d-4(a) (1965 Supp.); Water Resources Research Act of 1964 § 200, 78 Stat. 329, 42 U.S.C. § 1961b (1964); Water Supply Act of 1958 § 301(a), 72 Stat. 297, as amended, 43 U.S.C. § 390b(a) (1964); Fish and Wildlife Coordination Act § 2(a), 48 Stat. 401, as amended, 16 U.S.C. § 662(a) (1958). *Policies, Standards, and Procedures in the Formulation, Evaluation, and Review of Plans for Use and Development of Water and Related Land Resources*, S. Doc. 97, 87th Cong., 2nd Sess. (1962). INTER-AGENCY COMMITTEE ON WATER RESOURCES, *Policies and Procedures for Distribution and Coordination of Reports by Agencies Represented on the Inter-Agency Committee on Water Resources* 3-4 (rev. ed. 1958).

[5] *Cf.* Scenic Hudson Preservation Conf. v. FPC, 354 F. 2d 608 (2d Cir. 1965), *cert. denied* 16 L. ed 2d 540 (1966).

sites sixty miles upstream on the Salmon? What if the permittee decides to build his dam below a tributary (such as the Imnaha, in our case) which his permit left free for other uses?[6] Is the only remedy of these agencies, misled by the notice of the permit application, to intervene in the later licensing proceedings as an adversary, as the Secretary of the Interior had to do here?

Did Congress, enacting a statute to promote the comprehensive development of the Nation's waterways, write this deep-freeze joker into the Act?

There is nothing like this elsewhere in the land laws, all of which require certainty in the appropriation of public resources to private benefit. Congress planted no such hidden options in the Federal Power Act, to be discovered 45 years after its enactment.

VII. THE HEARST RULE IS NOT APPLICABLE TO THE COMMISSION'S DECISION.

Section 313(b), in terms, accords finality only to the Commission's determination of questions of fact, and it does not insulate the Commission from judicial review of its construction of a statute.[7] The court below,

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[6] Compare the Secretary of Agriculture's adverse comment on the Company's license application, because of its effect on National Forest interests in the Imnaha Valley (IV R. 224-41) with the Forest Service's acquiescence in the original permit, which excluded the Imnaha (I R. 153).

[7] This Court has not hesitated to substitute its own judgment for that of the Federal Power Commission in construing the Federal Power Act: F.P.C. v. Pacific Power & L. Co., 307 U.S. 156, 160 (1938), First Iowa Hydro Electric Cooperative v. F.P.C., 328 U.S. 152 (1946), F.P.C. v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954), as well as other statutes administered by this Commission: Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 677-78 (1954), Atlantic Ref. Co. v. Pub. Serv. Comm. of N.Y., 360 U.S. 378, 391 (1959), Texas Gas Transmission Co. v. Shell Oil Co., 363 U.S. 263, 270 (1960).

in effect, wrote such insulation into Section 313(b), relying on its interpretation of this Court's decision in *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 131 (1944). That decision sustained the National Labor Relations Board's determination that newsboys are "employees" (a term used but left undefined in the Labor Relations Act).[8] A rule enunciated to protect newsboys from their employers has no perceivable applicability to a case involving the development of public resources.[9] But even if the *Hearst* rule can be transported to such an alien field, it cannot validate the substitution of the Commission majority's judgment for that of Congress, for two basic reasons.

A. The Hearst rule does not insulate from judicial review an agency's exercise of powers which Congress withheld.

The Commission's whole authority to issue preliminary permits is found in Section 4(f). That section expressly conditions exercise of this power upon the prior issuance by the Commission of notice to affected public agencies, describing the project to be encompassed by the proposed permit, and publication of that notice. The Commission did this in 1954, electing to limit and restrict the notice and permit in identical terms to specific sites and defined areas, just as the Company elected to do in its application for a permit.[10]

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[8] The Commission did not invoke the *Hearst* rule below; neither did the Company. It was suggested to the Court of Appeals by an intervenor.

[9] "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." Federal Trade Comm. v. Bunte Bros., 312 U.S. 349, 353 (1941).

[10] "I do not mean to suggest that the Commission could not grant a permit with a broader scope but it is hard to imagine how a permit could state its limitations any more clearly than was done in the instant case." Chairman Swidler, dissenting, II R. 699.

Thus (1) no notice of intent to issue a permit encompassing High Mountain Sheep was ever given, and (2) the notice in fact given described another project with prescribed boundaries which excluded High Mountain Sheep. The notice requirement is jurisdictional.[1]

There is nothing in the *Hearst* rule which protects from judicial review an agency's decision[2] which arrogates to the Commission a power which Congress did not confer, indeed withheld save on compliance with a condition which the Commission never met.[3]

If a project, as described in a permit, is to be enlarged to cover "sites or areas not covered by the

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[1] Whatever might be countenanced in uncontested cases where third party rights are not prejudiced, the statute and regulations cannot be ignored when there is a competing applicant. In Seaton v. Texas Co., 256 F. 2d 718, 722 (D.C. Cir. 1958), the court concluded:

> "There is a wide latitude available to the Secretary in many situations, but he is bound by the statute. . . . Moreover, the Secretary's latitude is not the same in all circumstances. When the controversy is fundamentally between two private interests, . . . his discretion is not as great as when the controversy is between private interests on one hand and the Secretary 'as guardian of the people,' on the other . . . . The law is not blind to such distinctions."

[2] The "swing man" of the 3-2 majority here was not a lawyer. With proper deference to his experience and competence in another profession, these qualifications should not preclude this Court's independent exercise of its own expertise in construing the statute. By this one vote the Commission overruled the opinion of its staff counsel that the Company was not entitled to a "priority" and that the statute required recognition of Public Power's preference right. (IV R. 204-05.)

[3] Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946):

> ". . . An agency may not finally decide the limits of its statutory power. That is a judicial function."

original permit," Regulation 4.84 specifically requires an application for an amendment, and says that in such event "notice [to public agencies] of such application will be given in the manner required for the original application." This was not done. Whatever may be the proper limits of the *Hearst* rule, it has never been stretched to exempt the Commission from compliance with its own regulations. They bind the Commission and have the force of law.[4]

B. The Commission cannot frustrate the mandate of Congress by substituting its own coinage for the explicit words of the statute.

The Court below, quoting *Hearst's* reference to "a broad statutory term," analogizes "employee," the statutory term construed in *Hearst,* with "reach" here, as though "reach" occurred in the statute. It does not.

To the contrary, the statute directs that permits and licenses should all relate to "projects," and carefully defines "project" in Section 3(11).[5] The Act uses that term 69 times, "site" five times, "reach" not at all. In the Commission's regulations, "project" appears 236

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[4] Helvering v. Reynolds Tobacco Co., 306 U.S. 110 (1939); U.S. v. Shaughnessy, 347 U.S. 260, 267 (1954); Service v. Dulles, 354 U.S. 363 (1957).

[5] Sec. 3(11): "'project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit."

times, "site" 19 times, "reach" once (Reg. 4.30) and in a context significantly at odds with the Commission's decision.[6]

The Commission melts this coinage of Congress and reissues its own. They are as different as red and blue on the maps which illustrated the contrast at the opening of this brief.

The Commission's "reach" has exceeded its grasp of the intent of Congress.

In *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965), this Court recently said (p. 318):

> "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

In *NLRB* v. *Brown,* 380 U.S. 278 (1965), the Court at the same term, quoting the foregoing passage, said (p. 291):

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

That describes our case.

VIII. THE COMPANY'S PERMIT WAS DEAD WHEN IT APPLIED FOR THIS LICENSE.

The Company's permit, whether or not it ever embraced the High Mountain Sheep site, was dead when the Company filed its present license application. The permit was defunct for two reasons: (1) the Commis-

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[6] See pp. 27-28, *supra.*

sion in 1958 had denied a license application for the project covered by the permit, on grounds which, becoming res judicata, precluded its use on the High Mountain Sheep site; (2) in any event, the maximum statutory period of the permit expired eighteen months before the Company filed a license application conforming to the requirements of the statute. The dead permit conveyed no posthumous priority.

A. The sequence of events.

The Company's truly extraordinary High Mountain Sheep gambit involved these moves:

1. On April 1, 1955, the three-year statutory period of the Company's preliminary permit for the MS-PV project, No. 2173, began to run (I R. 155). As we have seen, it carefully excluded High Mountain Sheep and Nez Perce sites (*supra*, Part I). It expired March 31, 1958.

2. During this period the Company filed six semi-annual reports of the work done under the permit, as required by Article 9. They appear in the record, and not one of these mentions High Mountain Sheep (II R. 821-32). The reason was later candidly given (see item 11 in this chronology).

3. On January 20, 1958, the Commission denied a license application for this project (II R. 834). The grounds are discussed under "B" below.

4. On February 18, 1958, the Company applied for rehearing, stating that:

> "The Commission failed to act in accordance with Sections 5 and 10(a) of the Federal Power Act in that it *failed to protect applicant in its priority right* to undertake a project best adapted to a com-

prehensive plan, and failed to accord Applicant opportunity to take such steps, in view of the Commission's opinion, as are indicated necessary for such purpose. . . . [A]t least one alternative, a High Mountain Sheep dam at a site between the Salmon and Imnaha, was not included in the Commission's consideration, and opportunity must therefore be accorded to determine the place of that project within a comprehensive plan that meets standards of the Commission." (II R. 857; emphasis added.)

The Company therefore prayed the Commission:

"3. To so modify its order as to provide to the Applicant time and opportunity to determine such modification of Applicant's project and structures proposed therein and the location of such structures as will accord to the determination of the Commission as to the best comprehensive development of the resources involved, adequate time being permitted the Applicant for such field examination as may be required to develop further information not adequately provided in the present record. . . ." (II R. 861.)

5. On March 11, 1958, only twenty days before the three-year period would expire, the Company wrote the Commission in support of its petition for rehearing:

"Under paragraph 3 of its prayer, applicant *proposes to study the High Mountain Sheep project* on a comparative basis with Nez Perce . . . .

"*Approximately ten months will be required to complete such study,* depending upon the extent of drilling and engineering that may be necessary." (II R. 714; emphasis added. In fact, it took 18 months. See item 13 in this chronology, *infra.*)

The Company therein proposed a *future* work program of exactly the sort which Section 5 of the Act contem-

plates as being performed under a preliminary permit, and which Section 9 requires to be completed before, not after, submission of a license application.

In short, the Company asked the Commission (1) for time to substitute High Mountain Sheep for the two dams described in its permit (No. 2173) and pending license application, and (2) for priority protection under its permit for its putative new High Mountain Sheep project. But the Commission denied that application. (*Infra,* item 6.)

6. On March 20, 1958—eleven days to go—the Commission, with all the Company's foregoing communications before it, denied its petition for rehearing, saying that an opinion would follow (II R. 862).

7. On March 31, 1958, the last day of the three-year period of the permit, the Company filed a license application for a proposed project generally designated the "Middle Snake River" project (I R. 165). This was docketed as Project No. 2243. In purported compliance with Regulation 4.41, which requires that the application be accompanied by exhibits, including (Exhibit L) design drawings, the application incorporated by reference twenty-nine design drawings *of the rejected Pleasant Valley dam and powerhouse, the Low Mountain Sheep dam and powerhouse,* geological maps and sections, and drill hole logs at those sites, etc., all from its rejected MS-PV license application (I R. 171). These are reproduced at III R. 883-911. They had nothing whatever to do with High Mountain Sheep. As a purported compliance with the regulations, this performance was an outrageous sham; but it is all that connects up the priority of the permit with the license application now before the Court, which was finally submitted eighteen months later (item 13, *infra*).

To reiterate: Of 38 technical design drawings submitted by the Company as Exhibit L, 29 were designs of other dams, and 3 were lifted bodily from a public document.[7] The other six, in turn, were later withdrawn and superseded by new drawings, wholly different, 18 months after the pro forma license application was filed.[8] (Item 13, *infra.*)

8. On April 11, 1958, the Commission, now with the Company's March 31 license application on High Mountain Sheep before it, issued its formal opinion supporting its order of March 20 denying rehearing (II R. 863). See "B" below for the grounds.

9. On April 18, 1958, National Hells Canyon Association and Northwest Public Power Association filed a motion to dismiss the Company's license application on the ground that it was incomplete and failed to meet the filing requirements of the Act and the Commission's regulations (IV R. 324-28). The Commission never acted on this motion.

10. Five days later, by letter of April 23, 1958, the Company was informed by the Secretary of the Commission:

> "The Commission staff has made a preliminary examination of the application and the exhibits filed and *finds that additional information and*

[7] Sheets 36, 37 and 38 were geological diagrams marked on their face as having been taken from a 1947 report on the High Mountain Sheep site by the Corps of Engineers. (I R. 198-200.)

[8] Chairman Swidler's characterization is unanswerable (II R. 705-06): "The PNPC filing of March 31, 1958, was not complete as an application for a license. . . . The fact that PNPC's filing of March 31, 1958, for HMS did not contain sufficient information for an understanding of the project is not a mere technical deficiency in the circumstances of this case."

> *data are required for an understanding of the proposed project, including the proposed project boundary.*" (II R. 712; emphasis added.)

See p. 64, *infra*, for a discussion of this.

11. On June 27, 1958—about three months after the permit had expired—the Company filed with the Commission a "Petition for Declaratory Order," asking a ruling that its High Mountain Sheep license application was entitled to priority under Section 5 of the Federal Power Act, because of its MS-PV permit (the very issue now being litigated). The petition recited, *inter alia*, the following with respect to past investigations under the preliminary permit:

> "*. . . Structures below the mouth of the Imnaha River were not earlier investigated because, in the judgment of the applicant, fish passage devices had not been developed which would permit licensing of major structures obstructing runs of anadromous fish.*"

After referring to investigation of a different site for a high dam confusingly called High Mountain Sheep but identified as "located above the mouth of the Imnaha River," the communication continues that this and "the reason for *lack of contemporary investigation at sites below the Imnaha* are of record in the hearing held on Application for License for the Mountain Sheep-Pleasant Valley Project." (I R. 213.) (Emphasis added.)

It later withdrew this petition (I R. 235).

Note that the same request for protection of its "priority" had been made in the Company's petition for rehearing (item 4, *supra*), which the Commission had denied (item 6).

12. On February 27, 1959, the Company withdrew the 29 design sheets for low dams (item 7 above). Note that the decision to do so was not made until nearly a year after the present license application was filed. (I R. 220.)

13. On September 28, 1959, the Company filed its "second amendment" of application for High Mountain Sheep license, which, for the first time, supplied detailed plans for the project now before the Court (I R. 226, 229-33, IV R. 329-351), saying: "Indications on all Exhibit K maps of project boundaries, minimum and maximum pool levels, are to be disregarded," and submitting a map showing new project boundaries. This definitive formulation of the project took place eighteen months after the expiration of the permit.

14. Not until October 26, 1959, was the Commission sufficiently informed about the Company's new project to issue notice to public agencies of the filing of the license application (I R. 238), as required by Section 4(e) with respect to license applications not preceded by preliminary permits. This was 19 months after the permit had expired.

B. The Commission's decision in 1958 denying a license for the project encompassed by the permit precluded the use of that permit a second time to claim a priority on the High Mountain Sheep site.

The 1958 decision (items 3 and 8, *supra*) of course terminated the license application on the project encompassed by the permit (Mountain Sheep-Pleasant Valley). Did it also terminate the permit itself? We say it did. (See 1 below.) And even if the permit had nine lives, did the grounds of the decision (which the Company allowed to become res judicata) preclude the

permit's re-use in the geographical area proscribed by the decision, an area which included the High Mountain Sheep as well as Low Mountain Sheep sites? We say they did. (See 2 below.)

1. When the Commission acts upon a license application filed pursuant to a preliminary permit, the permit is functus officio, having served its "sole purpose" of preserving priority for the described project until the Commission acts.

Chairman Swidler, in his dissent, accurately summarized the congressional intent (II R. 702):

> "A preliminary permit under the Federal Power Act is but a step in the licensing process, incidental and preliminary to the issuance or denial of a license. The permit is issued 'for the sole purpose of maintaining priority of application for a license.' (sec. 5) In legal terms, it merges in the license to which it is incidental. Once this sole purpose has been served by final Commission action on the license the preliminary permit ceases to exist."

Chairman Swidler's conclusion reaffirms Commission policy first announced in 1923. An opinion of the Commission's general counsel, approved and adopted by the Commission as its own opinion[9] and reported to Congress, concluded that the priority afforded by a permit attaches to a license application filed pursuant to the permit and continues until the license is granted, denied, or withdrawn.

> ". . . The priority given by a preliminary permit attaches before use and before a definite appli-

[9] One of the first acts of the Commission was to provide that opinions of the general counsel, if approved by the Commission, were to be considered the opinions of the Commission. 1 F.P.C. Ann. Rep. 92, 135 (1921).

> cation for use can be made, and subsists until application for license in proper form is filed in conformity with its requirements, or until the time which it grants for that purpose expires. When application for license, duly perfected, as required by the Commission, is filed, the preliminary permit has served its purpose. The priority attaches to the application for a license and attends it until the application is withdrawn or is granted or rejected by the Commission.[10]

Contrary to the majority's dismissal of the decision as an "obscure opinion" (II R. 650), embodying "a gratuitous dictum . . . untested by the sharp exchanges of learned opposing counsel" (II R. 788), the opinion is particularly persuasive.[11]

The Commission's adoption of the general counsel's opinion was a contemporaneous construction of Section 5 by the agency charged with its administration and is entitled to substantial weight. The Commission included that opinion, in full text, in its Third Annual Report to Congress. It was the equivalent of a regu-

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[10] 3 F.P.C. Ann. Rep. 222, 223 (1923).

[11] The opinion was apparently prompted by the *Girand* case on the Colorado River, one of the most hotly contested hydroelectric cases which has ever confronted the Commission. See 2 F.P.C. Ann. Rep. 54, 128, 284 (1922); 3 F.P.C. Ann. Rep. 60-61, 132 (1923); 13 F.P.C. Ann. Rep. 227 (1933). As a result of the same license application, Congress imposed an embargo on issuance of licenses on the Colorado River (Acts of March 4, 1927, 44 Stat. 1456, and March 1, 1929, 45 Stat. 1446), which was not lifted until the Boulder Canyon Project Act (Act of Dec. 21, 1928, 45 Stat. 1057) became effective. See § 6 of that act. Congress was more than casually informed about the Girand case and all of the Commission's actions with respect to it.

lation and, until now, there has been no departure from it.[1]

2. The grounds on which the Commission denied the application for a license precluded the subsequent use of the permit on the High Mountain Sheep site. These grounds were not appealed and acquired statutory finality with respect to that permit.

The grounds of the 1958 decision were "that any combination of projects which includes Nez Perce is consistently superior to any combination of projects which does not include Nez Perce" (II R. 842). Whether these grounds were right or wrong, the Company did not petition for review under Section 313(b), and allowed them to acquire statutory finality. *Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 336-37 (1958). These grounds, of course, applied to the High Mountain Sheep site, because a Nez Perce dam would flood that site just as it would the Low Mountain Sheep site. By the same token, these grounds of decision proscribed an amendment of the permit as well as the license application to transfer either of them to the High Mountain Sheep site. The Company, on rehearing, had asked the Commission to amend its old license application to substitute High Mountain Sheep, because otherwise the priority derived from its permit was not protected (item 4, pp. 54-55, *supra*), but the Commission had refused, in a formal decision (item 6, p. 56, *supra*).

[1] The Commission has followed the rationale of the 1923 opinion in its administration of preliminary permits. The Commission's report to Congress on action taken upon preliminary permits during fiscal 1933 stated that ". . . 4 were terminated because of denial of applications for license filed pursuant thereto." (13 F.P.C. Ann. Rep. 3 (1933).) And in 1934 the Commission reported that ". . . one was terminated because of denial of application for license filed pursuant thereto." (14 F.P.C. Ann. Rep. 16 (1934).)

Of course, if the Company could not substitute High Mountain Sheep in its old license application, it could not so amend the permit, and it did not try. But this is the very permit now before this Court, unamended, which the Company now seeks to apply to a site forbidden in that unappealed decision.

The Company, in its new license application on High Mountain Sheep, filed in the teeth of that adjudication, elected not to include Nez Perce. This does not necessarily mean that the Commission erred in receiving the new license application for a project within the proscribed area. It does not mean that the Commission is now wrong in reversing its former high evaluation of the Nez Perce site. It *does* mean that the Commission erred in according to the new application a priority derived from the permit, which its own 1958 decision, not appealed, forbade to be used for the site now before the Court.[2] And, absent that supposed priority, the public preference is intact; so held below (IV R. 375).

C. In any event, the maximum statutory period of the permit expired eighteen months before the Company submitted a license application on the High Mountain Sheep site conforming to the statute.

Section 5, which is the sole source of the priority claimed here, conditions that priority. It provides that preliminary permits may be issued:

> ". . . for such period or periods, *not exceeding a total of three years,* as in the discretion of the

[2] Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958). Speaking of a litigant's failure to seek review under Section 313(b) of a point decided by the Commission, the Court said: "Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts." (*Id.* at 336-37.)

Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements." (Emphasis added.)

By what magic did this applicant, admittedly unprepared to file a proper license application twenty days before March 31, the expiration date of the permit (item 5, pp. 55-56, *supra*), and still unable to do so two months *after* Mar . 31 (item 11, p. 58, *supra*), become able to qualify f r a license for a fleeting instant of time on that one intermediate day, the last day of the life of its three-year permit? If it did not qualify by March 31, 1958, it had then lost the priority which could only have been earned by work done before that date. Article 3 of its permit so stipulated (I R. 162-63), and the Company's own semi-annual reports to the Commission show that no such work had been done (II R. 821-32; accord, I R. 213). Thereafter the permit could neither acquire nor transmit any posthumous priority.

And, to relate this point to an earlier one: We have seen that the Commission's expert staff could not understand "the proposed project boundary" (item 10, p. 57, *supra*) from the data which the Company submitted with its license application on March 31, 1956; that this boundary was not defined until September 23, 1959 (item 13, p. 59, *supra*); that these same experts could not formulate the statutory notice of license application required by Section 4(e) until October 1959, 19 months later (item 14, p. 59, *supra;* App. E to this brief). This being so, it is indefensible to impute prescient knowledge of these same 1959 boundaries to the public agencies as of 1954 because of

the notice of the permit application then published —a notice which described a smaller project with lesser boundaries embracing wholly different sites and areas (App. D to this brief). Does red equal blue on the maps opposite p. 3?

But, absent the five years' retroactive imputation of the 1959 project into the 1954 notice, the public preference on the High Mountain Sheep site was never destroyed, and this case must be reversed.

CONCLUSION

For the foregoing reasons, we ask that the decision below in case No. 18728, *Washington Public Power Supply System* v. *Federal Power Commission,* be reversed and ordered remanded to the Commission with instructions to give effect to the preference right of Washington Public Power Supply System to a license for its High Mountain Sheep project.

In such event, we have no objection to reversal and remand of the decision below in the companion case, No. 18731, *Secretary of the Interior* v. *Federal Power Commission,* so that the Commission may consider the cases of the two public agencies together on a new record. It called them "inextricably intertwined" (II R. 669). The two have effected a joint venture before, in the case of Washington Public Power Supply System's Hanford atomic energy plant (P.L. 87-701, Sec. 112), for the good of the entire region served by the Bonneville Power Administration. It is possible that, if both are before the Commission on remand, a solution may again be found, under this Court's guidance, that integrates the best features of public development, federal and local, on the basis of a new and up-to-date

record. We have no intention of excluding the Bonneville Power Administration from participation in the benefits of the High Mountain Sheep project if it is licensed to Public Power.

Respectfully submitted,

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APPENDIX A

Relevant Sections of the Federal Water Power Act, Approved June 10, 1920 (41 Stat. 1063, as [illegible] 16 U.S.C. 791a-825r)

APPENDIXES

A. [illegible] ---- 1a
B. Regulations ---- 7a
C. Legislative History ---- 10a
D. Notice of Company's Application for Preliminary Permit ---- 20a
E. Notice of Company's Application for License ---- 23a

APPENDIXES

APPENDIX A

Relevant Sections of the Federal Water Power Act, Approved June 10, 1920 (41 Stat. 1063, as amended, 16 U.S.C. §§ 791-823)

Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * *

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

* * *

[41 Stat. 1063, as amended, 16 U.S.C. § 796 (1964)]

Sec. 4. The Commission is hereby authorized and empowered—

* * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advan-

tageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

* * *

[41 Stat. 1065, as amended, 16 U.S.C. § 797 (1964)]

Sec. 5. Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to

comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing. [41 Stat. 1067, as amended, 16 U.S.C. § 798 (1964)]

• • •

Sec. 7. (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. [41 Stat. 1067, as amended, 16 U.S.C. § 800 (1964)]

• • •

Sec. 9. That each applicant for a license hereunder shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the

proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require. [41 Stat. 1068, as amended, 16 U.S.C. § 802 (1964)]

Sec. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

• • •

[41 Stat. 1068, as amended, 16 U.S.C. § 803 (1964)]

Sec. 24. Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved

from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located.

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[41 Stat. 1075, as amended, 16 U.S.C. § 818 (1964)]

Sec. 313. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satis-

faction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

[49 Stat. 860, as amended, 16 U.S.C. § 825*l* (b) (1964)]

APPENDIX B

Relevant Regulations Under the Federal Power Act (Title 18, Code of Federal Regulations) as of March 31, 1964

APPLICATION FOR LICENSE; GENERAL PROVISIONS

18 C.F.R. § 4.30 Who may file.

An application for license may be filed by any citizen, association of citizens, corporation, State, or municipality desirous of obtaining a license pursuant to the act: *Provided, however,* That if a preliminary permit has been issued, no action on applications by others than the permittee covering in whole or in part the same reach of stream or streams shall be taken that might infringe on the rights of the permittee under sections 5 and 7 of the Federal Power Act.

18 C.F.R. § 4.31 Acceptance for filing or rejection of applications.

When an application which conforms to the requirements of § 1.15 of this chapter is received, it will be given a filing number, notice of receipt thereof and filing number given thereto will be furnished applicant, and notices will be given in accordance with the requirements of section 4 of the act (49 Stat. 839; 16 U.S.C. 797), § 1.37 of this chapter, and the Wildlife Resources Act of 1946 (60 Stat. 1080). Notice will also be given to the appropriate office of the Department of the Interior as to the public lands affected, if any, so that withdrawals from entry may be recorded, unless such action has been taken in connection with a preliminary permit. An application may be acceptable for filing for processing prior to final Commission action thereon, provided it contains the information required under § 4.40(a), (b), (c), (d), (e), (f), and (h), together with Exhibits A, B, E, G, J, K, L, M, and O, required under § 4.41. Such application may include as Exhibit K, a project area map with such information with respect to lands affected as is readily available without a detailed survey, and as Exhibit L, the tentative design of the project works proposed. An application which fails to meet these requirements will be rejected by the Secretary as provided by § 1.14 of this chapter. However, the applicant may be required to furnish the balance of the information required under §§ 4.40 and 4.41 at such time as the Secretary directs and failure to furnish same will constitute grounds for rejection of the application by the Secretary as provided by § 1.14 of this chapter. The Commission may require as a condition of license that the licensee furnish additional or revised exhibits by a specified time and failure to furnish such information within the time specified or an extension thereof granted by the Commission shall constitute a violation of the license and cause for action under section 26 of the Federal Power Act. In case any information, documents or exhibits required to be filed

with an application are already on file with the Commission, in current form and substance, the same may be incorporated in the application by reference.

18 C.F.R. § 4.32 Hearing on application.

A hearing upon an application may be ordered by the Commission, in its discretion, either upon its own motion or upon the motion of any party in interest. The hearing shall be limited to the issues specified by order or orders of the Commission.

APPLICATION FOR LICENSE FOR PROPOSED MAJOR PROJECT OR MINOR PART THEREOF

18 C.F.R. § 4.40 Contents.

Each application for license for a complete project of more than 2,000 horsepower installed capacity, to be constructed, or for a minor part of such project shall be verified, shall conform to § 131.2 of this chapter, and shall set forth in appropriate detail the following information in the order indicated. Unless otherwise specified, the original and ten conformed copies of the application and all accompanying documents shall be submitted with one additional conformed copy for each interested State Commission.

• • •

(e) A concise general description of the project and the principal project works, including dams, reservoirs, water conduits, power houses, substations, switch yards, and transmission lines, in such detail as may be applicable.

(f) The location of the project, the region of its location designated by adjacent cities and towns, the name of the stream on which the proposed project will be located, and a statement of the extent to which commerce is carried thereon.

(g) The lands and reservations of the United States which will be affected by the proposed project.

(h) A description of the proposed initial and ultimate schemes of development including installed capacities contemplated in each scheme.

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18 C.F.R. § 4.41 Required exhibits.

There shall be filed as part of the application for license the following exhibits: *Provided,* That any exhibit not incorporated as a part of the application shall be certified in conformity with § 131.4 of this chapter:

• • •

Exhibit H. Statement of the proposed operation of the project works during times of low, normal and flood flows of the stream, including a statement of the minimum flow proposed to be released during periods of low water and to the extent possible full exposition of any proposed use of the project for the conservation and utilization in the public interest of the available water resources for the purposes of power, navigation, irrigation, reclamation, flood control, recreation, wildlife, and municipal water supply. Statement as to whether in relation to existing and proposed future projects in the same or related watersheds, the fullest practicable utilization of the water, storage possibilities, and head available will be made possible. Furnish operating rule for reservoirs with draw-down and usable storage, state criteria for determining spillway capacity.

Exhibit I. Estimate of the dependable capacity and average annual energy output to be generated by the project (dependable capacity for purposes of this section is equal to the amount of capacity from an alternative additional source which would be required to meet the load during the critical flow period for the system if the proposed hydro-project were not constructed). Specify the period of critical stream flow used in determining the dependable capacity and describe the load into which the power generated by the project will be utilized. Furnish

the following engineering data: A flow duration curve indicating the period of record and gaging stations used in deriving this curve, a tailwater rating curve, a curve showing estimated plant capability versus head, and an outline of plan for future proposed hydro-projects on the stream involved and their approximate location and ultimate installed capacity. When pertinent, state assumptions used for evaporation, leakage, and head losses.

Exhibit J. General map covering the entire project area, showing on a single sheet and to an appropriate scale the location of the following:

(1) Principal structures and other important features of the project, including such roads, railways, tramways, and bridges as it is proposed shall become part of the project works and be placed under the license.

(2) All transmission lines, substations, switchyards, and telephone lines, which it is proposed shall become a part of the project works and be placed under license, as well as general layout of the transmission system, if any, with which the project may be connected, indicating prominently by appropriate symbol the portion or portions of the transmission lines or system covered by application for license.

(3) State and county lines, reservations of the United States, towns, streams, stream gaging stations, railroads, power plants, irrigation systems and other features in the vicinity of the proposed development, information concerning which will aid in arriving at a general comprehension of the project.

(4) Reference to the detail map (Exhibit K) indicating by outline the portion shown on each sheet.

(5) If all features cannot be shown with sufficient distinctness on one sheet, two general maps may be furnished, one for the power plant and appurtenant works, and one for the transmission system. (See specifications for drawings § 4.42.)

Exhibit K. Detail map covering entire project area. Scale shall be such as to show clearly, but without unnecessary multiplicity of sheets, the essential details of surveys and of notes as to ownership or right of occupancy of lands within the project area. In general, a scale of approximately 400 feet to the inch is appropriate for features containing a relatively large amount of detail, and scales of 1,000 or 2,000 feet to the inch where there is little detail, as is frequently the case with respect to transmission and telephone lines, roads, and railways. Elevations shall be tied to Government bench marks whenever available, and shall be referred to mean sea level except that in the case of projects in navigable waters having a datum accepted for local use by the Office of the Chief of Engineers, Department of the Army, such local datum shall be used. If more than one sheet is used the sheets shall be numbered consecutively, and each shall bear a small diagram showing the entire map and indicating the portions shown on each sheet. Several sections of a conduit, transmission line, telephone line, road, railway, etc., may be shown upon a single sheet, each so placed or limited as to avoid crowding or confusion. Except to the extent and in such particulars as the requirements may be expressly waived or modified by the Commission the detail map to be filed as this exhibit shall conform to the specifications for drawings, § 4.42, and the following requirements:

(1) It shall show the project area and the project boundary.

* * *

(2) The location shall be accurately shown of all project works, such as—

(i) Dams.

(ii) Reservoirs. Show the flow lines for maximum and minimum water levels and for elevation of spillway crest, and give tables or diagrams of areas and capacities for

maximum and minimum water levels and for each contour line.

(iii) Water conduits. Show center line, grade, and elevation of bottom at each change of grade, and designate lengths of each type of conduit, i.e., flume, ditch tunnel, pipe, etc.

(iv) Powerhouses, substations, and switchyards.

(v) Transmission lines and appurtenances, telephone lines, roads, railways, trails, tramways and bridges.

(vi) Navigation structures.

(vii) Channel approaches to navigation structures. Indicate elevation of bottom for distance of not less than 1,000 feet above and below the structures.

(3) Show contour lines with contour intervals of not more than 10 feet for the entire project area, except such portions as will be occupied only by such project works as are enumerated in (2)(v), or as will be included in reservoirs below the minimum elevation to which the water may be drawn down. Profiles of tunnel lines may be substituted for contours along such lines. (See specifications for drawings in § 4.42.)

Exhibit L. General design drawings showing plans, elevations, and sections of all principal structures and appurtenant works or other features of the project. These drawings shall be in sufficient detail and shall be accompanied by sufficient information relating to controlling factors (such as character of foundations and explorations thereof, materials and types of construction, important elevations, gradation of filter and riprap material, design and ultimate strengths for concrete and steel, stress and/or stability analysis for important structures, water levels, spillway rating curves, etc.) to enable the Commission to have a full understanding of the project and to check safety, adequacy, and desirability in the development of the resources involved.

Scales are not specified, but it is desired that they be no larger than necessary to show clearly the information required. Drawings should be simple. Details are desired only as necessary to show features of importance in determining safety, adequacy, and suitability of design. Working drawings are not desired as part of application, but should be prepared for purposes of construction and retained as a record of the work when completed. In this exhibit shall be included—

(1) Dams and appurtenances, such as spillways, fishways, outlet works, etc.

(2) Navigation structures and approaches thereto, including locks, lock gates, operating machinery, etc.

(3) Conduits including forebays, intake works, surge tanks, and other pressure relief devices, etc.

(4) Powerhouses and substations (see specifications as in § 4.42).

Exhibit M. General descriptions of mechanical, electrical, and transmission equipment and their appurtenances in sufficient detail to enable the Commission to have a full understanding of the project, to determine the installed capacity in horsepower and kilowatts, and to determine the safety of the project works and their adequacy and suitability for the development and utilization of the resources involved, also proposed name plate ratings for generators and turbines, and when required by the Commission or the Secretary performance data for generators and turbines and general specifications of mechanical, electrical, and transmission equipment.

Exhibit N. Estimate of the cost of developing the project including the following items:

Land and land rights;

Power plant structures and improvements;

Reservoirs, dams and waterways;

Water wheels, turbines and generators;

Accessory electric equipment;

Miscellaneous power plant equipment;

Roads, railroads, and bridges (permanent facilities); and

Transmission facilities.

• • •

Exhibit O. Detailed statement of the time desired for beginning and completing construction of the projects works. If the ultimate development is to be completed and put into operation in two or more parts, the time desired for beginning and completing the construction of each part shall be given.

• • •

APPLICATION FOR PRELIMINARY PERMIT AND AMENDMENTS THEREOF.

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18 C.F.R. § 4.80 Who may file.

Any citizen, association of citizens, corporation, State, or municipality desirous of obtaining a license pursuant to the act for a project of more than 2,000 horsepower installed capacity may make application for the issuance of a preliminary permit for the purpose of enabling applicant to secure the data and perform the acts required by law for filing an application for the issuance of a license.

18 C.F.R. § 4.81 Acceptance for filing or rejection of applications.

When an application which conforms to the requirements of § 1.15 of this chapter is received, it will be given a filing number; receipt thereof and filing number given thereto will be furnished applicant, and notices will be given in accordance with the requirements of section 4 of the act (49 Stat. 830; 16 U.S.C. 797) and § 1.37 of this chapter. Notice will also be given to the appropriate office of the Department of the Interior as to the public lands affected,

if any, so that withdrawals from entry may be recorded. An application may be acceptable for filing for processing prior to final Commission action thereon, provided it contains the information required under § 4.82(a), (b), (c), (d), (e), (f), (g), and (k), together with Exhibits A, B, C, D, H and I. An application which fails to meet these requirements will be rejected by the Secretary as provided by § 1.14 of this chapter. However, the applicant may be required to furnish the balance of the information required under this section and § 4.82 at such time as the Secretary directs, and failure to furnish same will constitute grounds for rejection of the application by the Secretary as provided by § 1.14 of this chapter. In case any information, documents or exhibits required to be filed with an application are already on file with the Commission, in current form and substance, the same may be incorporated in the application by reference.

18 C.F.R. § 4.82 Contents of application.

Each application for preliminary permit shall be submitted as prescribed in § 131.10 of this chapter, and shall set forth in appropriate detail the following information in the order indicated. Unless otherwise specified, the original and ten conformed copies of the application and all accompanying documents shall be submitted, with one additional conformed copy for each interested State Commission.

• • •

(e) The location of the project, the region of its location designated by adjacent cities and towns, the name of the stream on which the proposed project will be located, and a statement of the extent to which commerce is carried thereon.

(f) The lands of the United States which will be affected by the proposed project.

(g) A general description of the project and the proposed scheme of development including an estimate of the proposed installed capacity, and the average annual output.

• • •

(k) (Required exhibits.) There shall be filed as part of the application the following exhibits: *Provided,* That any exhibit not incorporated as a part of the application shall be certified in conformity with § 131.4 of this chapter.

• • •

Exhibit H. A general map showing the nature of the proposed project, its principal features and their location, and the location of the project as a whole with reference to some well-known town or stream. On this map shall be placed a line indicating the approximate project boundary of the area to be occupied by the principal project works, such as, dams, reservoirs, forebays, waterways, and powerhouses, but excluding transmission lines, and where necessary in order to determine the location of such structures on the ground, there shall be shown on the map their relative positions with respect to permanent monuments or objects that can be readily recognized from descriptions thereof noted on the map. (See specifications for drawings, § 4.42.)

Exhibit I. This exhibit shall be submitted only if public lands or reservations are affected and shall be a map of the proposed project showing principal project works in a manner similar to the preceding exhibit H, except that such map shall show and shall be on a scale to present effectively a tentative project boundary which shall be the line enclosing all quarter-quarter sections, lots, and other smallest legal subdivisions of public-land survey which may be occupied or used in whole or in part by the project. It shall also show the status of lands, indicating separately lands patented, lands entered or otherwise embraced in any unperfected claim under the public-land laws, unreserved public lands, and lands of each and every reservation

affected. (See specifications for drawings, § 4.42.) If desired a single map may be submitted for exhibits H and I, provided it shows all the information required for both.

18 C.F.R. § 4.83 Hearing on application.

A hearing upon an application may be ordered by the Commission, in its discretion, either upon its own motion or upon the motion of any party in interest. The hearing shall be limited to the issues specified by order or orders of the Commission.

18 C.F.R. § 4.84 Amendments.

Applications for amendments of preliminary permits shall follow the form prescribed for original applications, as far as applicable. If an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application. Unless otherwise specified, an original and ten conformed copies of the application and all accompanying documents shall be submitted, with one additional copy for each interested State Commission.

18 C.F.R. § 5.1 Amendment of license.

Where a licensee desires to make a change in the physical features of the project or its boundary, and/or make an addition or betterment and/or abandonment or conversion, of such character as to constitute an alteration of the license, application for an amendment of the license shall be filed with the Commission, fully describing the changes licensee desires to make. If, after consideration of an application for amendment of the license, the Commission is of the opinion that the contemplated changes are of such character as to constitute a substantial alteration of the license, public notice of such application shall be given by an advertisement made at least 30 days prior to action upon the application. Unless otherwise specified, the original and ten conformed copies of the application for amendment of license shall be submitted, with one additional copy for each interested State Commission, in accordance with § 131.30 of this chapter and verified.

APPENDIX C

Legislative History of Sections 4(f), 5, and 7(a) of the Federal Power Act

I. Introduction

The Federal Water Power Act[1] resulted from efforts during the Wilson administration to promote the development of the Nation's water power resources. At that time power site development on the public domain was regulated by the Secretaries of Interior and Agriculture under the Act of February 15, 1901,[2] while dams on or affecting navigable streams were authorized by Congress on a project by project basis under the General Dam Act.[3] The first meaningful efforts to improve those systems were begun by the 63rd Congress (1913-15) and were two-pronged: one proposal attempted to eliminate some of the shortcomings of the existing system governing power site development on the public lands in the West, while a companion approach sought to develop a coordinated system of licensing power plants on or affecting navigable waters under the jurisdiction of the Secretary of War.

Although bills dealing with navigable waters and public lands passed the House during the 63rd Congress, Senate opposition to the House proposals prevented enactment. A similar stalemate resulted in the 64th Congress (1915-1917). In the 65th Congress (1917-1919), however, an administration proposal abandoned the effort to treat public lands and navigable waters separately and recommended the creation of a three-man commission, composed

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[1] Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. §§ 791-823 (1958). The Act of August 26, 1935, 49 Stat. 838, incorporated the Federal Water Power Act as Title I of the Federal Power Act.

[2] 31 Stat. 790, as amended, 43 U.S.C. § 959 (1958).

[3] Act of June 21, 1906, 34 Stat. 386, as amended by Act of June 23, 1910, 36 Stat. 593.

of the Secretaries of Interior, Agriculture and War, to regulate licensing of hydroelectric plants on both the public lands and navigable waters. This proposal gained widespread support in both houses and, after a number of compromises were worked out on several key provisions of the bill, it was enacted by the 66th Congress.

1. The Federal Power Act's legislative history shows a progressive strengthening of the provisions for preference to public agencies[4]

(1) *The preference to public agencies, originally discretionary, was made mandatory.*

The intent to prefer public agencies under a federal licensing scheme of some sort was embodied in most of the bills proposing water power legislation from 1914 to 1920. Some of the earlier proposals left the recognition of the preference to the discretion of the licensing authority,[5] but the directive was made mandatory in the bill which became the Federal Water Power Act.

In 1918 the Wilson administration sent to Congress a draft of bill, in the format now appearing in the Act, creating a new Federal Power Commission to consist of the three Secretaries (Interior, Agriculture, War) who had administered water power permits under prior legislation. This draft, amended, as reported out by the House Water Power Committee, left the matter of granting a preference to public agencies to the Commission's discretion.[6]

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[4] The Federal Water Power Act, now Part I of the Federal Power Act, was enacted as the Act of June 10, 1920, 41 Stat. 1063, in the 66th Congress. It was preceded by bills in the 63rd, 64th, and 65th Congresses, some of which passed both houses but failed of approval of conference reports. The Act acquired its present format in the 65th Congress, in 1918. For background, see H. Rep. No. 715, 65th Cong., 2d Sess. 13-15 (1918).

[5] *E.g.*, § 1 of H.R. 14893 (63rd Cong.), § 1 of H.R. 16673 (63rd Cong.) and § 1 of H.R. 408 (64th Cong.).

[6] H. Rep. No. 715, 65th Cong., 2d Sess. 5 (1918).

However, when the bill reached the House floor, it was amended to make the preference language mandatory. Rep. Doremus, author of the amendment, explained that it:[7]

> ". . . makes it mandatory upon the Commission to grant the license to the State or municipality, if the plans submitted by it are, in the judgment of the Commission, as good as those submitted by the private applicant."

There were similar expressions in the Senate. See, *e.g.*, the colloquy between Senators Borah and Walsh:[7a]

> "MR. BORAH. . . . I do not expect at this time to have a bill which will contain nothing but provisions with reference to public ownership, but I do want a bill when the public ownership question is presented which shall compel those executing the measure to give them the preference, and that is all I hope for. When the people of a community decide they want public ownership I want that to be final.
>
> "MR. WALSH. The Senator and I are at one on that point."

The directive remained mandatory through the remainder of the 65th Congress, was embodied in Section 7(a) of H.R. 3184 in the 66th Congress, and enacted in its present form.

(2) *A corollary amendment was adopted to preserve this preference even if the public agency's project was less well adapted to comprehensive development of the waterway than the competing project of a nonpublic license*

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[7] 56 CONG. REC. 9804 (1918). There were similar sentiments expressed in the Senate. See, *e.g.*, the colloquy between Senators Walsh and Borah. *Id.* at 10484.

[7a] 56 Cong. Rec. 10484 (1918).

applicant, provided that the public agency's plan could be made equally well adapted, within a reasonable time to be fixed by the Commission.

Section 7, as reported by the House Committee in 1918, required as a condition for recognition of the preference that the public agency's plans be "best adapted" to conserve and utilize the water resources of the region, etc.[8]

However, there were continuing efforts in the 65th and 66th Congresses to amend that language to require a preference to a public agency even if its initial proposal for a project was not as comprehensive as that of a competing private applicant.[9]

The result was the present language of the statute requiring that preference be given provided the public agency's plans "shall within a reasonable time to be fixed by the Commission be made equally well adapted." The underlying philosophy was forcefully stated by Representative Sinnott (58 CONG. REC. 2037-38 (1919)):

> "I do not want to see a municipality foreclosed and concluded in case its plan is not as good as some other plan. I think if the municipality or the State is willing to amend or modify the plan first filed by it and make that plan as good as the other plan filed, that it should have that opportunity, and my amendment seeks to give the municipality that opportunity to modify and amend its plan and make it as good and as efficient as any other plan filed."

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[8] H. REP. No. 715, 65th Cong., 2d Sess. 5 (1918).

[9] 56 CONG. REC. 9804-05 (1918); 58 CONG. REC. 2037-38 (1919); S. REP. No. 180, 66th Cong., 1st Sess. 13 (1919); 59 CONG. REC. 1105 (1920).

(3) *Proposals to restrict the exercise of the preference to contests over preliminary permits, and deny to public agencies the right to assert a preference to a license, were not accepted.*[10]

(4) *Instead, the preference was broadened to include both licenses and preliminary permits.*[1]

(5) *An amendment which would have restricted the preference to power used for State and municipal purposes was rejected.*[2]

(6) *Notice of applications for preliminary permits was required to be given to public agencies, to enable them to assert their preference rights.*[3] (*Infra*, pp. 29a-30a.)

(7) *The requirement of notice to public agencies was expanded to include license applications which had not been preceded by preliminary permits.*[4] (*Infra*, p. 33a.)

(8) *The preference was expanded to apply to the issuance of new licenses upon the expiration of original licenses.*[5]

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[10] *Hearings on Water Power before the House Committee on Water Power*, 65th Cong., 2d Sess. 161-62, 298, 816-17 (1919).

[1] *Id.* at 112, 386, 389, 817, 818, 821; H. REP. No. 715, 65th Cong., 2d Sess. 5, 16 (1918).

[2] 58 CONG. REC. 2038 (1919).

[3] 56 CONG. REC. 9762 (1918).

[4] S. REP. No. 180, 66th Cong., 1st Sess. 12 (1919); 59 CONG. REC. 1105 (1920).

[5] S. REP. No. 180, 66th Cong., 1st Sess. 13 (1919); 59 CONG. REC. 1105 (1920).

2. The legislative history requires that the sole exception to the preference, i.e., where a preliminary permit has been issued, be restricted to the express language of the permit. The statute does not give the permittee more than he asks for

The general rule of construction, that exceptions to broad statutory policies should be strictly construed, is reinforced here by the legislative history of Sections 4(f) and 5 in relation to the dominant policy expressed in Section 7(a). This shows a running conflict between two philosophies: (1) That the preliminary permit should confer an exclusive option on a lease or license; (2) That the permit should not be exclusive, should not confer a right to a license, but should simply protect a potential applicant for a license by a priority with respect to a specific project area for a limited period while he occupied that area and acquired the data required by the statute to be incorporated in a license application for that specified project. Congressional policy crystallized in the latter direction. But all agreed that the right given by the permit, whatever that right might be, was restricted to the sites and areas stated in the permit. The most extreme assertion of a priority or preference right of a permittee was a proposed amendment saying he "shall be entitled to a preference right to lease *the lands embraced in the permit.*" (*Infra*, p. 25a.) No Senator or Congressman suggested the Commission's present interpretation, that a permit conveys an implied option to transfer its priority to areas outside its specified boundaries. Thus:

(1) *Language which would entitle the permittee to a mandatory preference right to a lease, recommended in early committee reports, was ultimately rejected.*

In the 63rd Congress the House Public Lands Committee reported out H.R. 16673.[6] Section 1 authorized the Secretary of the Interior to:

". . . grant a preliminary permit authorizing the occupation of public lands valuable for water-power

[6] H. Rep. No. 842, 63rd Cong., 2d Sess. (1914).

> development for a period not exceeding one year . . . the tenure of the proposed lease and the charges or rentals to be collected thereunder to be specified in said preliminary permit, and *such permittee upon filing an application for lease prior to the expiration of the permit period shall be entitled to a preference right to lease the land embraced in the permit* upon the terms, conditions and limitations authorized by this act."[7]

On the House floor this mandatory preference right for a permittee attracted controversy. The same section said the Secretary of the Interior "*may in his discretion* give preference to applications for leases by States, counties, or municipalities," etc. (Emphasis added.) On the one hand, Representative Raker offered an amendment to strengthen the permittee's preference to make issuance of a lease to him mandatory (51 CONG. REC. 13699 (1914)). This amendment was rejected (*id.* at 13700). On the other hand, Representative Mann moved in the opposite direction to delete all of the Committee's language, beginning with the words "the tenure of the proposed lease," and his amendment was accepted (*id.* at 13799-800).

When the bill reached the Senate, the Senate Committee amended the language to make issuance of a lease mandatory,[8] but the bill did not reach a vote in the Senate.

A similar stalemate developed also in the 64th Congress on H.R. 408, a similar bill.[9]

The language which Congressman Mann deleted remained out of the bill as enacted in 1920.

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[7] *Id.* at 2. (Emphasis added.)

[8] S. REP. No. 898, 63rd Cong., 3rd Sess. 1, 4 (1915).

[9] Compare the language of § 1 of H.R. 408 as reported by the House Committee on Public Lands (H. REP. No. 16, 64th Cong., 1st Sess. 1 (1916)) with §1 as reported by the Senate Committee on Public Lands (S. REP. No. 66, 64th Cong., 1st Sess. 1 (1916)).

(2) *The language in Section 7(a) "where no preliminary permit has been issued" was proposed at a time when the public preference language of Section 7(a) was still discretionary, not mandatory, and when Section 5 contained language (later repealed) which implied that a permit conferred a mandatory right to a license.*

In the 65th Congress the issue was revived. The administration draft bill (from which the format of the present law is derived) was considered by the House Committee on Water Power as an amendment to S. 1419.

Mr. O. C. Merrill, Chief Engineer of the Forest Service, testified as follows on the potential conflict between the (then) implied preference to permittees in Section 5 and the (then) discretionary preference to public agencies in Section 7(a):[10]

> "MR. MERRILL. The preliminary permit will state the conditions under which the license will be granted, and if the permittee complies with the conditions he gets the license.
>
> "MR. PARKER. *It is an option?*
>
> "MR. MERRILL. Yes, sir. In section 7 is the preference clause for licenses which gives the *discretion* to the commission to prefer any municipality over a

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[10] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 55 (1919). (Emphasis added.) Sections 7 and 5 in the administration bill contained the following relevant language at the time of Mr. Merrill's testimony (H. REP. No. 715, 65th Cong., 2d Sess. 14-15, 23, 24, 33 (1918):

> "Sec. 7. That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation and water resources of the region; . . ."
>
> "Sec. 5. . . . Each such permit shall set forth the conditions under which priority shall be maintained and a license issued. . . ."

> private applicant, but it was intended that the *mandatory* language of section 5 should control the *permissive* language of section 7 in case the preliminary permit was already in existence." (Emphasis added.)

In both respects, Congress reversed Mr. Merrill's premises. As we have seen, it later made the preference to public agencies mandatory instead of permissive (pp. 20a-21a, *supra*) and, as we shall see in a moment, it still later deleted the language from which Mr. Merrill inferred that the permit gave the permittee a mandatory option on a license (p. 33a, *infra*).

At the conclusion of Mr. Merrill's testimony, he offered an amendment to Section 7(a), to insert, after the language giving the Commission discretionary power to give preference to public agencies, the qualification "where no preliminary permit has been issued."[1] The Committee did not include Mr. Merrill's suggestion in S. 1419 as reported.[2] The bill as passed by the House September 5, 1918, did not contain that language.

S. 1419 as amended by the House went to conference. Mr. Merrill's language appeared for the first time in the conference report,[3] although neither house had approved such an amendment. The report gave only the following explanation of this change, among others, in Section 7:[4]

> ". . . after the word 'licenses' the words 'where no preliminary permit has been issued' are inserted, . . . Your committee thought these changes were in the interest of clarity."

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[1] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 116 (1919). (Emphasis added.)

[2] H. Rep. No. 715, 65th Cong., 2d Sess. 5, 16 (1918).

[3] H. Rep. No. 1147, 65th Cong., 3d Sess. 5 (1919).

[4] *Id.* at 16.

When the House considered this conference report, Representative Sims, chairman of the House Committee on Water Power, and of the House conferees, told the House that:

> "... the bill as agreed to in conference, so far as the fundamental provisions of the bill are concerned, so far as any question of principle is concerned, is practically in all respects just as it passed the House." (57 CONG. REC. 4636 (1919)).

The House adopted the conference report (*id.* at 4640-41), but the Senate failed to act on it.

There is nothing in the legislative history to suggest that Mr. Sims was wrong or that the House, by adopting this language, intended to undo its careful strengthening of the public agency preference, which it had just made mandatory instead of discretionary, and which it had buttressed otherwise (pp. 20a-23a, *supra*).

And there is nothing to suggest that the conferees intended to give the proponents of the permit more than they had proposed but the House had rejected, namely, a "preference right to lease the lands *embraced in the permit.*" (*Supra*, pp. 24a-25a.) (Emphasis added.)

This conference report was the basis of H.R. 3184 in the 66th Congress, which enacted it. But there was no discussion of this language in either house in that Congress.

(3) *Congress amended Section 4(f) to avoid conferring an exclusive right of occupancy on a single permittee, even with respect to a single specified site.*

As we have seen, the first Ferris bill (H.R. 16673, 63rd Cong.) reported out in 1914 authorized the Secretary of the Interior to issue preliminary permits for "the occupation of public lands valuable for water-power development for a period not exceeding one year" and provided that the permittee "upon filing an application for lease prior to the expiration of the permit period shall be entitled to a

preference right to lease *the lands embraced in the permit,*"[5] a provision later deleted (pp. 24a-25a, *supra*). (Emphasis added.)

Subsequent consideration of the bill proceeded on the assumption that the preliminary permit would relate to a particular project. For example, Rep. Mann secured an amendment broadening the language in § 1, authorizing the issuance of preliminary permits, to make "permit" plural "in order that more than one man or more than one concern might investigate the power possibilities of a particular place." (51 CONG. REC. 13800-01 (1914).)[6]

Testimony of administration spokesmen confirmed the intent of the sections now numbered 4(f) and 5 that more than one preliminary permit could be issued for a particular site, and specifically rejected the concept of an exclusive preliminary permit.[7] Efforts of utility spokesmen to delete the Mann amendment failed.[8] "Permits" remained plural, and so appears in Section 4(f) today.

The private utility representatives also fiercely fought for a guarantee that a permittee who complied with all the terms and conditions of his permit would be assured a license. This effort was not successful. If there was any doubt, Congress removed it in 1935. (*Infra*, p. 33a.)

(4) *To protect the preference rights of public agencies, the Commission's authority to issue preliminary permits was subjected to a condition precedent, issuance by the*

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[5] H. REP. No. 842, 63rd Cong., 2d Sess. 2 (1914).

[6] The Mann amendment was retained in the Senate version of the bill. S. REP. No. 898, 63rd Cong., 3rd Sess. 4 (1915). It was embodied in § 1 of the second Ferris bill in the 64th Cong., (H.R. 408; S. REP. No. 66, 64th Cong., 1st Sess. 1 (1916)), carried over into section 4(e) (now 4(f)) of the administration bill in the 65th Congress (H. REP. No. 715, 65th Cong., 2d Sess. 23, 32 (1918)), and enacted. 41 Stat. 1066 (1920), 16 U.S.C. § 797(f) (1958).

[7] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 57-58 (1919).

[8] 51 Cong. Rec. 13801 (1914).

Commission of prior written notice to the agencies likely to be affected by the proposed project.[9]

(5) *For the further protection of public agencies and other users of the public domain, these requirements of notice were expanded to require publication in the counties in which the lands affected by the project are located.*[10]

Senator Walsh first called this problem to the attention of the House Committee in 1918, during consideration of the administration bill (S. 1419, 65th Cong.), which was the predecessor of that enacted in 1920:

> "'In practically all of the public lands legislation provision is made in the law under which the applicant is required to give notice of his purpose to apply for a patent to the lands, title to which he seeks. No provision of that kind is found in this bill, and it occurs to me that it would be eminently advisable not to make a grant of these permits or licenses, which in some instances at least may be exceedingly valuable, without giving everybody who desires to compete for them an opportunity to present his claim.'"[1]

The House Committee reported the bill, with amendments,[2] but without Senator Walsh's proposal. On the floor, Representative Sinnott moved to amend Section 4(e) (now Section 4(f)) by adding the following proviso:[3]

> "*Provided, however,* That upon the filing of any application for a preliminary permit by any person or corporation the commission before granting such application shall at once give notice of such application, in writing, to any State or municipality likely

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[9] 56 Cong. Rec. 9762-63 (1918).

[10] 56 Cong. Rec. 9762-63 (1918).

[1] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 834 (1919).

[2] H. Rep. No. 715, 65th Cong., 2d Sess. (1918).

[3] 56 Cong. Rec. 9762 (1918).

to be interested in or affected by such application, and shall also publish notice of such application for four weeks in a daily or weekly newspaper published in the county or counties affected by said application."

Mr. Sinnott explained the purpose of his amendment as follows:[4]

"Mr. Chairman, subdivision (e) of section 4 is the subdivision relative to preliminary permits. In section 7 it is provided that in issuing preliminary permits in the discretion of the commission preference may be given to States or municipalities. It is well known, however, that municipalities and public officials are often very dilatory and that they sleep upon their rights. It seems to me it is wise to provide that as soon as an application is filed by any person or corporation that notice shall be at once given to the various municipalities, which mean the county, city, irrigation district, drainage district, or other political division of the State. Notice to them that an application for the preliminary permit has been filed should be given. This will bring knowledge directly home to the State or the county or the city officials and give them an opportunity to present their application if they desire public or municipal ownership, where otherwise the matter would be entirely overlooked and snap judgment would be taken against them, and they would be foreclosed from filing application."

Representative Raker further pursued the question of whether the notice provisions were adequate to protect both public agencies and others (such as homesteaders) interested in the lands affected by the proposed permit, ending with the following colloquy:[5]

"Mr. RAKER. Mr. Chairman, this amendment provides that before action is taken to grant the preliminary permit to any person or corporation the commission, before granting it, shall at once give notice—

[4] *Ibid.*

[5] *Ibid.*, at 9763.

of such application in writing to any State or municipality likely to be interested or affected by such application.

"How are you going to tell whether they are likely to be interested? The purpose is to give general notice to the public, and I am asking the committee if they believe this is a sufficient notice to be given on a matter of this kind.

* * * * *

"The counties are not affected. A county can not be affected."

* * * * *

". . . The committee will remember that this was one of the things that Senator WALSH appeared before the committee and argued and asked it to especially consider and place in the bill."

Rep. Anderson then moved to amend Rep. Sinnott's designation of where notice should be published to read as follows:[6]

". . . in the county or counties [affected by said application] *in which the project or any parts thereof or the lands affected thereby are situated.*"

Rep. Anderson's language, which he suggested "meets the exact situation which the gentleman from Oregon has in mind a little more specifically than his amendment does,"[7] was accepted by Rep. Sinnott and the Sinnott amendment, so modified, was adopted.[8]

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[6] *Ibid.* (Deletion bracketed, addition italicized.)

[7] *Ibid.*

[8] *Ibid.*

Two things stand out in this colloquy: (1) Congress was narrowing, not expanding, the privilege conferred by the permit, by tightening its identification with lands to be specifically described; (2) the geographical scope of the permit with respect to its effect on public agencies was to be exactly the same as its scope with respect to other users of the public domain.

(6) *The requirements of notice and publication were still further expanded to apply to applications for licenses when not preceded by preliminary permits.*[9]

(7) *In 1935, Congress amended Section 5 to remove any inference that a permittee had a preference right to a lease, even upon the areas embraced in the permit.*

Mr. Merrill's premise (*supra*, pp. 26a-27a), that Section 5 implied a "mandatory" option on a license in the permittee's favor, caused enough concern to bring about, in 1935, the repeal of the specific language that he relied upon. The Public Utility Holding Company Act of 1935, incorporating the Federal Water Power Act as Part I of the new Federal Power Act (Title II of the 1935 enactment), amended section 5, changing the sentence, "Each such permit shall set forth the conditions under which priority shall be maintained and a license issued," by deleting "and a license issued."[10]

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[9] S. REP. No. 180, 66th Cong., 1st Sess. 12 (1919); approved by the Senate, 59 Cong. Rec. 1105 (1920), agreed to by the House, H. REP. No. 910, 66th Cong., 2d Sess. 1, 8 (1920), 59 Cong. Rec. 6538 (1920), and enacted 41 Stat. 1066 (1920).

[10] § 203, 49 Stat. 841 (1935).

The House Committee on Interstate and Foreign Commerce said:[1]

> "This section amends section 5 of the Act. In the sentence providing that preliminary permits shall set forth the conditions under which priority can be maintained 'and a license issued', the quoted words are eliminated. A preliminary permit is obviously not intended to carry the right to a license even if the applicant complies with all the conditions of the permit. Omission of these words is calculated to make entirely clear what was undoubtedly the original intention of the law in this regard."

The Senate Committee on Commerce said:[2]

> "... In the sentence providing that such permits shall set forth the conditions under which priority shall be maintained 'and a license issued', the quoted words are stricken out. It was plainly not the intent of the act to have a preliminary permit carry the absolute right to a license, even if the applicant complies with all the conditions of the permit. The quoted words, however, are relied upon in support of the contention that a permit does carry that right. Omission of those words is calculated merely to free the issue from doubt."

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[1] H. Rep. No. 1318, 74th Cong., 1st Sess. 23 (1935). See, to the same effect: testimony of the Solicitor of the Commission, *Hearings on S. 1725 Before the Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess. 236 (1935); S. Rep. No. 621, 74th Cong., 1st Sess. 43-44 (1935).

[2] S. Rep. No. 621, 74th Cong., 1st Sess. 43-44 (1935).

APPENDIX D

Notice of Application for Preliminary Permit

(Filed December 21, 1954)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Project No. 2173

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

December 16, 1954

NOTICE OF APPLICATION FOR PRELIMINARY PERMIT*

Public notice is hereby given that application has been filed under the Federal Power Act (16 U.S.C. 791a-825r) by Pacific Northwest Power Company, of Portland, Oregon, for preliminary permit for proposed Project No. 2173, consisting of two proposed water-power developments designated as Mountain Sheep and Pleasant Valley, to be located on Snake River in Idaho County, Idaho, and Wallowa County, Oregon, affecting lands of the United States within Wallowa, Weiser and Nez Perce National Forests, and described respectively as: Mountain Sheep, comprising a concrete arch dam with top elevation of about 1108 feet (m.s.l.) located at river mile 192.6 in SE¼ Sec. 30, T. 29 N., R., 3 W., B. M., Idaho, and SE¼ Sec. 18, T. 4 N., R. 49 E., W. M., Oregon, creating a reservoir extending about 20.6 miles to the Pleasant Valley site; a powerhouse with provisions for installation of 250,000 kilowatts of generating capacity; and appurtenant facilities; and Pleasant Valley, comprising a concrete arch dam with top elevation of about 1475 feet (m.s.l.) located at river mile 213.2 in NW¼ Sec. 29, T. 27 N., R. 1 W., B. M., Idaho and SW¼ Sec. 17, T. 2 N., R. 51 E., W. M., Oregon, creating a res-

* II R. 810-11.

ervoir extending about 34 miles to Hells Canyon dam site containing about 850,000 acre-feet of storage capacity of which about 300,000 acre-feet will be usable for power, flood control, and other beneficial uses; a powerhouse with provisions for installation of 600,000 kilowatts of generating capacity; and appurtenant facilities.

Protests or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D. C., in accordance with the Rules of Practice and Procedure of the Commission (18 C.F.R. 1.8 or 1.10), the time within which such petitions must be filed being specified in the rules. The last day upon which protests may be filed is February 3, 1955. The application is on file with the Commission for public inspection.

LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

APPENDIX E

Notice of Application for License

(Docketed Oct. 26, 1959)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Project No. 2243

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

NOTICE OF APPLICATION FOR LICENSE*

(October 26, 1959)

Public notice is hereby given that Pacific Northwest Power Company, of Portland, Oregon, has filed an application under the Federal Power Act (16 U.S.C. 791a-825r)

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*I R. 238-39.

for a license for proposed water-power Project No. 2243, to be known as the High Mountain Sheep Hydroelectric Development and located on the Snake River and its tributary the Imnaha River, in Idaho and Adams Counties, Idaho, and Wallowa County, Oregon, and to consist of a concrete arch dam with side hill gated overflow spillway section located on the Snake River in Idaho and Oregon approximately .5 of a mile upstream from the Salmon River and 2.5 miles downstream from the Imnaha River forming a reservoir with top elevation of 1510 feet, extending 58.5 miles upstream from the dam to the Low Hells Canyon Development of Project No. 1971 and having total and maximum usable storage capacities of 3,600,000 and 3,100,000 acre-feet, respectively; two powerhouses located immediately downstream from the dam abutments, one on the Oregon side with initial installation of three generating units and provision for ultimate installation of two additional units, and the other on the Idaho side with initial installation of two generating units and provisions for ultimate installation of three additional units, each unit in both powerhouses being rated 175,000 kilowatts; an adjacent switchyard; and associated hydraulic and electrical facilities.

Protests or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D. C., in accordance with the Rules of Practice and Procedure of the Commission (18 CFR 1.8 or 1.10). The last date upon which protests or petitions may be filed is December 4, 1959. The application is on file with the Commission for public inspection.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.